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The opinion of Judge Toney, of the Louisville Law and Equity Court, in the case of Kentucky Wagon Mfg. Co. v. Louisville & Nashville R. R. Co., is of considerable importance, involving a comparatively new field of investigation. The question at issue arose between some shippers and the railroad companies, out of the workings of what is known as a car service association, a combination of railroads which is incidental to freight delivery in all the larger cities. In the present case it seems that the Louisville association adopted rules for the government of shippers and refused to deliver freight upon plaintiff's side-tracks and switches, in view of the latter's refusal to comply with its rules and regulations, particularly those requiring the shipper to unload cars within a certain period of time, under a penalty for his failure to do so. It was contended on the part of the plaintiff that the rules were unreasonable and unnecessary, and, therefore, not binding, and a perpetual injunction was asked to restrain the defendants from withholding the deliveries of cars, loaded and consigned to the plaintiff, on account of any non-compliance on the part of the plaintiff with the rules of the car service association. It was insisted on the part of the defendants that the character of the relief sought was such as a court of equity is incapable of enforcing, involving a superintendence by the chancellor of the delivery of cars, the furnishing of motive power, the prompt unloading and return of cars, etc. Judge Toney, however, was of the opinion that the fact that in enforcing specific performance of a complicated, continuing contract, the court may have to resort to frequent attachments and to rules for contempt, and even to the commitment of recalcitrant contemnors is no argument at all for the non-existence of the power in the court to exercise such jurisdiction; nor is the length of time covered by a contract any bar to its specific enforcement by a court of equity. He agreed with Judge Brewer, that "the powers of a court are as vast and its processes and procedures as elastic as all the changing emergencies of increasing complex business relations and the protection of rights can demand." It will be remembered that Judge Brewer used that language in the case of C., R. I. & P. Ry. Co. v. U. P. Ry. Co., where specific performance was sought and compelled of a contract for joint use of tracks by railroads that was to run for nine hundred and ninety-nine years. (33 Cent. L. J. 221.) The court here also held that railroad companies have a right to adopt reasonable rules and regulations as to shippers and consignees and freight, and after an exhaustive consideration of the rules adopted in the present case, the court concluded that they were reasonable.

The novel question involved in Hancock v. Yaden, about which we had something to say (30 Cent. L. J. 405), comes up again in the case of Commonwealth v. Perry, published in full on page 78 of this issue. It will be noted that the view of the Massachusetts court in the latter case is directly at war with the Indiana court in the former. How far it is within the power of the legislature to abridge or limit the right to make reasonable contracts is the question presented, though the student may possibly be able to find in the facts of the two cases distinguishing features. There does not seem to be any substantial difference, and so is evidently the opinion of Judge Holmes, who dissents in the Massachusetts case, and approves of Hancock v. Yaden. As we said of the latter case, we cannot avoid indulging every presumption against the validity of acts which are in derogation of the right of citizens generally to manage their own affairs as they please, so long as they do not violate any substantive rule of law. We are decidedly in favor of the Massachusetts doctrine.

Bryce's American Commonwealth brought to its author a full cup of honor and fame, but, if the daily papers are to be believed, it has also involved him in financial ruin. It seems that A. Oakey Hall, ex-mayor of New York, has brought suit in England against Mr. Bryce, alleging that the chapter in the latter's work on the Tweed ring is untrue, and

has damaged him to the extent of $50,000. The alleged libelous chapter was not written by Mr. Bryce, but was prepared for him by a professor at Columbia College. A great mass of testimony is now being taken in New York to be used at the trial, and as the defense of actions for libel in England involves much expense, it is reported that even if the result should be favorable to Mr. Bryce, it will cost him a small fortune and practically ruin him. A daily newspaper, in commenting upon this, takes occasion to sneer at the law, which, it says, quoting the words of Charles Macklin, "is a sort of hocus-pocus science that smiles in your face while it picks your pocket."

Though not indorsing the extreme view of the daily newspaper, we are free to say that the incident above noted illustrates, in our opinion, a very serious defect in the administration of justice. That a defendant against whom suit is brought, without reason or justification, as the trial reveals, should be obliged to bear the heavy financial burdens incident to a defense, is not just. We do not refer, of course, to the ordinary costs of court, which follow the judgment. As is well known, they are frequently an insignificant part of the actual costs of litigation. There should be in our systems of procedure provisions requiring the unsuccessful party to reimburse the successful one to the extent, at least, of reasonable attorney's fees. However others may differ with us as the practicability of such a measure, all will unite with us as to its justice.

NOTES OF RECENT DECISIONS.

BANKS — REFUSAL TO PAY CHECK — DAMAGES.—In Schaffner v. Ehrman, 28 N. E. Rep. 917, the Supreme Court of Illinois decide that a banker who refuses to cash a check drawn by a depositor engaged in trade, who has sufficient funds on deposit to meet the check, is liable therefor in substantial damages, even though the refusal was caused by a mistake and there is no evidence of special damage or of actual malice. The court grounds its opinion upon Rolin v. Stewart, 14 C. B. 595, where it was held that the jury ought not to confine their verdict to nominal damages, but should give such temperate damages as they should judge to be a reasonable compensation for the injury they must have sustained from the dishonoring of their checks. In Pennsylvania the point is directly decided in Patterson v. Bank, 130 Pa. St. 419. Craig, J., dissents from the conclusion of the court.

DEED—ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.—Cribben v. Deal, 27 Pac. Rep. 1046, is a well considered case, by the Supreme Court of Oregon, on the question of the validity of a deed of general assignment, where a third person, after it was signed and sealed in pursuance of a parol authority, filled in the name of the grantee and delivered the deed to him. In upholding its validity the court says:

Hence it was held that parol authority to fill a blank with the name of a grantee could not be conferred without violating established principles of law and rendering the deed void. This doctrine still prevails in England. It is true that in the case of Texira v. Evans, cited in Master v. Miller, 1 Anstr. 225, Lord Mansfield held otherwise, but this was in effect overruled in Hibblewhite v. McMorine, 6 Mees. & W. 200, on the ground that an authority to execute a sealed instrument could not be given by parol, but must be given by deed, although this latter case seems more or less trenched upon by the decision in Eagleton v. Gutteridge, 11 Mees. & W. 465, and by Davidson v. Cooper, *Id.* 778, and in West v. Steward, 14 Mees. & W. 47. But the rule has never been universally accepted in this country, and however the holding of some courts may be, still the better opinion and the prevailing current of authority is that when a deed is regularly executed in other respects, with a blank left therein for the name of the grantee, parol authority is sufficient to authorize the insertion of the name of such grantee, and that, when so filled out and delivered, is a valid deed. It is true that Chief Justice Marshall, in U. S. v. Nelson, 2 Brock. 74, felt bound to follow the ancient rule, but his opinion clearly indicates that he felt that the authority to fill a blank in an instrument under seal should be held to be valid. He says: "The case of Speake v. U. S., 9 Cranch, 28, in determining that parol evidence of such assent may be received, undoubtedly goes far towards deciding it, and it is probable that the same court may completely abolish the distinction in this particular between sealed and unsealed instruments." Again: "If this question depended on those moral rules of action which in the ordinary course of things are applied by courts to human transactions, there would not be much difficulty in saying that this paper ought to have the effect which the parties at the time of its execution intended it should have. And he concludes with this statement: "I say with much doubt, and with a strong belief that this judgment will be reversed, that the law on the verdict is, in my opinion, with the defendants." The rule was purely technical, and the outgrowth of a state of affairs and condition of the law which does not now exist. The reason of the law is the life of it, and when the reason fails the law itself should fail.

At the present day the distinction between sealed and unsealed instruments is fast disappearing, and the courts are gradually doing away with them. As Judge Redfield said: "But it [the rule] seems to be rather technical than substantial, and to found itself either on the policy of the stamp duties, or the superior force and sacredness of contracts by deed, both of which have little importance in this country; and the prevailing current of American authority and the practical instincts and business experience and sense of our people are undoubtedly otherwise." Redf. R. R. p. 124. In Drury v. Foster, 2 Wall. 24, the court says: "Although it was at one time doubted whether parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion of this day is that the power is sufficient." Again, in Allen v. Withrow, 110 U. S. 119, 3 Sup. Ct. Rep. 517, the court says: "It may be, and probably is, the law in Iowa, as in several States, that the grantors in a deed conveying real property, signed and acknowledged, with a blank for the name of a grantee, may authorize another party by parol to fill up the blank."

"But," he continues, "there are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it: The blank must be filled by the party authorized to to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named." In the case at bar these conditions were fulfilled. In Inhabitants of South Berwick v. Huntress, 53 Me. 89, the court held that a party executing a deed, bond, or other instrument, and delivering the same to another as his deed, knowing there are blanks in it to be filled, necessary to make it a perfect instrument, must be considered as agreeing that the blanks may be thus filled after he has executed it. In delivering the opinion of the court, Kent, J., said: "The rule invoked is purely technical. Practically there is no real distinction in this matter between bonds and simple contracts. There is no more danger of fraud or injury or wrong in allowing insertions in a bond than there is in allowing them in a promissory note or bill of exchange, and in neither can unauthorized alterations be made with impunity. Considering that the assumed difference rests on a mere technical rule of the common law, we do not think that the rule should be extended beyond its necessary limits, viz., that a sealed instrument cannot be executed by another, so as its distinguishing characteristic as a sealed instrument is in question, unless by an authority under seal." Likewise, in Bridgeport Bank v. New York, etc., R. Co., 30 Conn. 274, Ellsworth, J., said "Nor can any reason be assigned, which is founded in good sense, and is not entirely technical, why a blank in an instrument under seal may not be filled up by the party receiving it, after it is executed, as well as any other contract in writing, where the parties have so agreed at the time. In either case, the contract, when the blank has been filled, expresses the exact agreement of the parties, and nothing but an extreme technical view, derived from the ancient law of England, can justify the making of any distinctions between them." It is to be noted that both of these adjudications were by courts of States where seals were not abolished. In Burnside v. Wayman, 49 Mo. 357, where the name of the grantee in a trust-deed was left in blank, Wagner, J., said: "It is contended that no recovery could be had or relief granted on the first count, because no grantee was named in the deed of trust, and that, in consequence thereof, the instrument was void, and no title conveyed; but we think otherwise. Whatever may have been determined in some of the old books, the better doctrine is against such a position." And subsequently, in Field v. Stagg, 52 Mo. 534, this doctrine was affirmed in all its breadth, the court saying: "A deed, regularly executed in other respects, with a blank left therein for the name of the grantee, and placed in that condition in the hands of third person, with verbal authority, but no authority under seal from the person who executed it, to fill up the blank in his absence, and deliver the deed to the person whose name is inserted as grantee, when so filled out and delivered is a valid deed." In Duncan v. Hodges, 4 McCord, 239, it is held that a deed executed with blanks and afterwards filled up and delivered by the agent of the party is good. So in Van Etta v. Evenson, 28 Wis. 33, it was held that where a note and mortgage otherwise fully executed, but with a blank in each for the name of the payee and mortgagee, were delivered to an agent, who was to procure from whomsoever he could a loan of money thereon for the maker, this shows an intention that the agent should fill the blanks, and, when so filled, the instruments were valid without a new execution and delivery. And the same doctrine was expressly affirmed in Schintz v. McManamy, 33 Wis. 301, the court by Lyon, J., saying: "It was doubtless competent for the grantors to authorize Emil by parol to insert the name of the grantee in the deed, after they had signed and acknowledged the same." And in State v. Young, 23 Minn. 551, it was held that authority to fill a blank in a sealed instrument may be given by parol, and that such authority may be either express or implied from circumstances and that it may be implied from circumstances whenever these, fairly considered, will justify the inference. So in Swartz v. Ballou, 47 Iowa, 188, where the owner of land executed a deed in blank, and placed it in the hands of another party under circumstances which raised an implied authority in the latter to insert the name of the grantee, it was held that the insertion of the grantee's name, either by the party receiving the deed or by some one authorized by him, made the instrument perfect as a conveyance. Without referring to the authorities at greater length, there are numerous other cases supporting the same doctrine. Wiley v. Moor, 17 Serg. & R. 438; Smith v. Crooker, 5 Mass. 538; Gibbs v. Frost, 4 Ala. 720; Woolley v. Constant, 4 Johns. 54; *Ex parte* Decker, 6 Cow. 60; Manufacturing Co. v. Davis, 7 Blackf. 412; Boardman v. Gore, 1 Stew. (Ala.) 517; Bank v. Hall, 14 N. J. Law, 583; Ragsdale v. Robinson, 48 Tex. 379. The contrary rule was adopted in Upton v. Archer, 41 Cal. 85; Preston v. Hull, 23 Gratt. 600; Ingram v. Little, 14 Ga. 173; and some other cases. It seems to us that the weight of authority and better opinion is that parol authority is sufficient to authorize the filling of a blank by the insertion of the name of the grantee in a deed, after its execution, but before delivery, as in the case at bar.

EXTRADITION—TRIAL FOR DIFFERENT OFFENSE.—The Supreme Courts of Ohio and Colorado are in direct conflict upon the question of the right to proceed against an extradited prisoner for a different crime than that for which he was extradited, in the cases respectively of *Ex parte* McKnight, 28 N. E. Rep. 1034, and Williams v. Weber, 28 Pac. Rep. 21. The Ohio court holds unequivocally

that a person surrendered to the authorities of this State by another State or territory on extradition proceedings cannot, while held in custody thereunder, be lawfully tried for a different crime than the one upon which his extradition was obtained, unless he voluntarily waives his privilege, and that the privilege is not waived by failure to plead it in abatement of the indictment for such different crime, nor by entering a plea of not guilty thereto, when, before the trial, the accused asserts his privilege, and objects to the trial on that ground. The court grounds its decision upon the previous ruling in that State in State v. Vanderpool, 39 Ohio St. 273, and the decision of the United States Supreme Court in U. S. v. Rauscher, 119 U. S. 407, wherein the doctrine is applied to international extradition. It is also contended that though some courts have attempted to distinguish between cases of international and those of interstate extradition, in regard to the point here considered, there is in point of fact no foundation for the alleged distinction, and the same doctrine should apply in both cases. The Colorado court, on the other hand, in the case above noted, hold flatly that one brought from another State by requisition may be arrested and tried for a crime committed before he left the State, although it is not the one with which he was charged when he was extradited. Inasmuch as this conclusion is opposed to the weight of authority and contains some interesting reasoning, we give the principal part of the opinion of the court delivered by Bissell, J.:

Every court which has passed on the question must have been impressed with the diversity of judicial opinion on this subject. As may be gathered from the decisions, the differences between the courts do not seem to have arisen from the complexity or the difficulty of the inquiry. A tender, and hardly commendable, solicitude for the personal rights and and liberties of those accused of crime has led many courts to the astute in the erection of barriers to the successful prosecution of crime. On the other hand, there are many tribunals which have not failed to recognize the justice and exact logic of the principles established by the common-law courts of England, and have adhered closely to the decisions which they have rendered. On the question presented by this record those decisions are uniform and concurrent, and are approved by the current of judicial authority in this country. At the common law, an individual could be tried and convicted for any crime known to the jurisdiction in which he was arranged, regardless of the means used to bring him within that jurisdiction or of the circumstances under which he was found therein. Unless there were other grounds upon which the court's jurisdiction could be successfully assailed, or the proceedings were in some way irregular, the only available plea was "not guilty." When the matter was first presented, these courts unhesitatingly held that the prisoner could not be heard to defend on the ground that by force, fraud, or covin he had been gotten within the jurisdiction where he was being tried. According to the right reason of the case, the judges said that was a matter which concerned only the authorities of the country whence he had been brought. If the law of the country of the arrest had been outraged and violated, the guilty parties could easily be proceeded against under treaty stipulations, as they might exist, or under the general principles of international law and the comity of nations, which were recognized as of binding force by all civilized countries. It was not denied that the prisoner might have a remedy against his captors. Possibly it would be more accurate to say that a right of action existed in his favor, since, as the learned justice said in the Ker's Case (119 U. S. 437, 7 Sup. Ct. Rep. 225), "whether he could recover a sum sufficient to justify the action would probably depend upon the moral aspects of the case." Why this rule should ever have been doubted or questioned is not plain. Undoubtedly the tendency of American courts to go to extremes in the protection of the right of personal liberty has had much to do with it. The whole body of the criminal law has been disfigured by the more or less successful endeavors to ingraft thereon a mass of rules, presumptions, and technical requirements totally at variance with the general policy of the law, and unnecessary either to the defense of the individual or the protection of the public.

The chief support of the opposing rule is drawn from the supposed analogy between proceedings for the extradition of criminals from foreign countries under treaty stipulations with their governments and those taken under our own organic law. The analogy does not exist, the circumstances are totally different, and the reasons adduced in support of the one do not even tend to maintain the other. Whenever a treaty is entered into between nations which provides for the surrender of fugitives from justice, it attempts, at least, to define the crimes, determine the circumstances, and specify the proceedings and proofs, essential to recognition of the right to demand the surrender of the accused person. The limitations to be deduced from the terms of treaties between foreign powers cannot be found in a constitutional requirement which amounts to an agreement between the States to surrender, on proper demand, all persons accused of crime. It is wholly unimportant what the crime is. The only inquiry at all essential is as to whether he is accused of that which the law of the demanding State has made a crime. The act may neither be a common-law offense, nor yet one under the laws of the State of his refuge. The regularity of the demand is the sole matter for the consideration of the executive, and the inquiry as to the commission of the offense and the guilt of the accused is to be answered by the courts of the State demanding his return. The fugitive is not guilty or innocent, as he may happen to be on one side or the other of the line which marks the limits of sovereignty of the different States. Territorial lines neither affect the question of guilt or innocence, nor do they operate to grant rights or immunities. Under our national system and compact, a fugitive from justice obtains no right to protection against the State whose laws he has violated by fleeing within the boundaries of another whose laws he has not broken. The constitutional provision under which his return is demanded was not in-

tended for his benefit, nor can a defense be extracted from its terms. Its purpose was to secure the return and punishment of those who had violated the law, and it cannot be tortured by construction into a constitutional guaranty against punishment for crime. The present inquiry only concerns one who was brought by constitutional means within the jurisdiction of the court which was proceeding to try him. The authorities clearly support this position. *Ex parte* Scott, 9 Barn. & C. 446, 17 E. C. L. 204; State v. Brewster, 7 Vt. 118; Dows' Case, 18 Pa. St. 37; State v. Smith, 1 Bailey, 283; Mahon v. Justice, 127 U. S. 700, 8 Sup. Ct. Rep. 1204; Ker v. State, 110 Ill. 627; Ker v. People, 119 U. S. 437, 7 Sup. Ct. Rep. 225; State v. Ross, 21 Iowa, 467; Ham v. State, 4 Tex. App. 647; *In re* Mahon, 34 Fed. Rep. 525; State v. Stewart, 60 Wis. 587, 19 N. W. Rep. 429; *In re* Miles, 52 Vt. 609.

LIBEL—CALLING ONE AN "ANARCHIST."—In Cerveny v. Chicago Daily News Co., the Supreme Court of Illinois held that it is libelous to falsely publish of a person that he is an "anarchist." The court says:

An "anarchist" is defined by Webster to be: "An anarch; one who excites revolt, or promotes disorder in a State," and this we assume to be a sufficiently accurate definition of the word. It is moreover here alleged that at the time and place of the publication complained of, it was commonly understood and believed that "the doctrines, opinions, beliefs, teachings and tenets of said class, party or sect called 'Anarchists,' as aforesaid, and of the persons composing said class, party or sect, is that the law and order of society then, and ever since then, and now, existing should be overthrown by revolution and force." It cannot therefore be correctly said that this is no more than charging the plaintiff with being a member of a certain political party; for anarchy, being the enemy of all governments, is necessarily the reverse of a political party, which is always in support of some form of government, and, professedly, of that which is the best. It seems to have been assumed, in the courts below, that it is not libelous to publish, falsely and maliciously, that one entertains principles merely which if carried into practice would be violative of law and destructive of all government and of every right secured by it. It may for the present be conceded that an action would not lie for slander because of the speaking of words, orally only, which would amount to such a charge against an individual; but the rule in regard to libel is different. An action for libel may be sustained for words published which tend to bring the plaintiff into public hatred, contempt or ridicule, even though the same words spoken would not have been actionable. Folk. Starkie Sland. & L. §§ 155, 156; Newell Defam. 78 *et seq.*; Hare & W. Lead. Cas. 131; 3 Am. & Eng. Enc. Law, 298, and cases cited in notes. And it would seem so apparent that an individual may be brought into hatred, contempt or ridicule, within the meaning of the law, by professing vicious, degrading or absurd principles, and especially by professing them and also confederating with others, alike professing them, to give them effect, that it can need no discussion. The following cases may however be referred to as illustrative of the correctness of this view of the law: Hoare v. Silverlock, 12 Q. B. 624; Wakley v. Healey, 7 C. B. 591; Williams v. Karnes, 4 Humph. 9; Duncan v. Brown, 15 B. Monr. 186; Stow v. Converse, 3 Conn. 325; Giles v. State, 6 Ga. 276. Since government is the only guaranty we can have for protection in the enjoyment of life, and of all that makes life desirable, it is inevitable that all good citizens must regard those who advocate its destruction either with feelings of hatred or contempt, in the same measure that they may regard them as powerful or impotent to carry out what they advocate.

NATIONAL BANKS—BONA FIDE DISCOUNTS—SALE OF COMMERCIAL PAPER—USURY. — The Court of Appeals of Kentucky, in Nicholson v. National Bank, consider very much the same question as arose in Executors v. National Bank of Elizabeth, 34 Cent. L. J. 22. It was held in the Kentucky case that under Rev. Stat. U. S. § 5136, authorizing a national bank to exercise necessary powers to carry on the business of banking by discounting and negotiating promissory notes, etc., the purchase of a note from the payee, with the latter's indorsement, is a purchase by discounting in the usual course of business, such as is authorized by the statute, and is not a purchase by barter and sale, as would be the case if the note was taken without indorsement, or by indorsement without recourse. The fact that the bank discounted the note for the payee at a gross discount, four days before maturity, instead of charging the usual rate, is not sufficient to prove notice to the bank of any infirmity in the paper to let in the antecedent equities between the makers and the payee. Where a national bank purchases a note at a usurious discount, such purchase does not affect the title to or the negotiable character of the paper. Bennett, J., says:

It is insisted by the makers that the note was not purchased by discounting it in the regular course of banking business, but by mere barter and sale, which purchase was, under the national banking law, *ultra vires*. Consequently the appellee acquired the title to the note by the purchase; or, if the purchase was not void in consequence of its being *ultra vires*, the purchase was not of that character that gave the note in the hands of the appellee, as an innocent holder for value, the immunity of a foreign bill of exchange, but was of that character, to-wit, a mere purchase by barter and sale, that entitled the appellants, as makers, to rely on any defenses to the note in hands of the appellee that they could have relied on against the payee. The lower court instructed the jury that if they believed that the appellee discounted the note before its maturity, etc., in the usual course of business, and without notice of any infirmity in the note, they should find for the appellee. The court refused to submit the question as to whether or not the purchase of the note was by mere barter and sale. Therefore it must be construed that the court was of the opinion that there was not sufficient evidence of that

fact to entitle the question to go to the jury; or that, if the purchase was by barter and sale, it was not, in consequence of it, *ultra vires*, or that it did not reduce the note from the footing of a foreign bill of exchange to the level of an ordinary promissory note. If the court was in error as to these propositions, the case must be reversed; if not, it must be affirmed. The act of congress relating to the powers of appellee, among other things, provides: "To exercise by its board of directors, or duly authorized officers, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes," etc. Section 21, ch. 22, Gen. St., provides, in substance, that promissory notes payable to any persons or corporation, and payable and negotiable at any bank incorporated under any law of this State, or organized in this State under any law of the United States, which notes shall be indorsed to and discounted by the bank at which they are made payable, or by any of the banks specified, they shall be placed upon the same footing as foreign bills of exchange. There is no dispute about the fact that the note was made payable and negotiable at a bank organized in this State under the law of the United States, and that it was purchased before its maturity, and without notice of any infirmity in it, and that the appellee was organized in this State under the law of the United States; but the contention is, as said, that the purchase was not by discounting the note in the usual course of banking business, but by barter and sale; hence the purchase was either *ultra vires* and void, or that the note, by reason of such purchase, was not placed upon the footing of a foreign bill of exchange, but it was subject to any defenses that the appellants were entitled to as against the payee. If the purchase of the note was by discounting it in the usual course of business—the business of discounting—and not by barter and sale, all controversy as to the right of the appellee to recover its value as upon a foreign bill of exchange is at an end. What, then, is a purchase by discount and a purchase by barter and sale? The first named is defined as follows: "By language of the commercial world, and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money, upon negotiable paper or other evidences of debt, payable at a future day, which are transferred to the bank." See 5 Amer. & Eng. Enc. Law, p. 678. The discounting indicated is a purchase by discounting, as distinguished from a purchase by barter and sale. The latter is defined by Bouvier and this court to mean that the seller does not indorse the note at all, except, perhaps, without recourse, and is not accountable upon the contract for the value of it. He is only responsible, in such sale, for fraud, and upon his implied warranty that the note is genuine. In all else the purchaser takes the note for better or worse; hence he gives, as a general thing, less for it. See 1 Bouv. Law Dict. tit. "Discount;" Triplett v. Holly, 4 Litt. (Ky.) 131. Which category is the purchase in? Let us see. The substance of the uncontradicted evidence of the appellee's cashier is that the appellee's usual discount is 8 per cent.; that four days before the maturity of the note he purchased it in the usual course of trade, the time being short, at a lumping discount of one dollar. The appellant contends that this lumping discount, or "lumping trade," as the witness calls it, was not discounting in the usual course of trade. Therefore the purchase of the note was either *ultra vires* and void, or it was deprived of its footing as a foreign bill of exchange, and stood in the attitude o having been purchased by barter and sale, which let in the antecedent equities between the makers and payee as against the note in the hands of the appellee. But the purchase of the note was not, in effect, by barter and sale; for, as seen, the elements of a sale, without an assignment, or an assignment without recourse, and the non-accountability for the value of the note, are wanting to make such sale of a case like this. Here the seller of the note and another did indorse it, and thereby bound themselves to be accountable for its value, and the note was purchased before its maturity for value, and in the usual course of discounting, and without notice of any infirmity in it. All the elements requisite to put the paper in the hands of the appellee, upon the footing of a foreign bill of exchange, were complied with, save, as is contended, it was discounted by a lumping trade, and not according to the rule of 8 per cent., ascertained by exact calculation. But it seems to us that the taking a greater sum as discount than 8 per cent., and by a lumping trade, does not deprive the paper of its footing as a bill of exchange. The law of congress does not prescribe the per cent. that shall be charged as discount in order to make the purchase by discount not *ultra vires*, or to make it have the character of negotiable paper. The per centum of discount is left optional with the bank, except, if such per centum amounts to usury, the bank forfeits its entire interest, etc.;,but the purchase, so far as the title of the note and its negotiability if concerned, is not affected by the usurious discount. Nor does the act of congress require the bank to adopt any uniform per centum of discount; that matter is left optional with the bank. It may adopt a general rule upon the subject, which it may disregard or change as often as it pleases; or it may not adopt any general rule at all on the subject, but make the per centum of discount a subject of bargain upon the occasion of each purchase, controlled by the ability and punctuality of the parties, etc. The pivotal question is not whether the bank purchased the note by discounting at a regularly established per centum, or by a lumping trade, but whether the note was purchased by discounting it in the usual course of trade, that of bank discounting, at any price the parties might agree on, before the maturity of the note, and without notice of any infirmity in it. These conditions being answered in the affirmative, the paper is entitled to the immunities of negotiable paper. It is true the discount might be so great as to be strong evidence, in connection with other circumstances tending to prove notice of the infirmity of the paper, that the bank had notice at the time it bought the paper of its infirmity. But such is not the case here.

MUNICIPAL CORPORATION—DEFECTIVE SIDEWALK—ABUTTING OWNERS.—In City of St. Louis v. Conn. Mut. Life Ins. Co., 17 S. W. Rep. 637, the Supreme Court of Missouri hold that the violation of a city ordinance which required the owner of property fronting on a street to keep his sidewalk free from snow and ice, and prescribed a penalty for such violation, does not make such owner liable to the city for damages paid by it to one who received injuries by reason of the

property owner's failure to keep his sidewalk clean. Brace, J., says:

The cause of action set up in the petition is that the plaintiff, by the final judgment of the circuit court of St. Louis, was compelled to pay one Mattie C. Norton the sum of $1,291.18, damages and costs, for injuries received by her from a fall in passing over a sidewalk on Locust street, in said city, in front of defendant's property, made dangerous and unsafe by an accumulation of snow and ice thereon, which the defendant suffered and allowed to remain in violation of the city ordinances; wherefore the city asks judgment for the amount it was so compelled to pay. The ordinances recited in the petition require the owners to keep the sidewalk and gutters in front of their property clean, and, after any fall of snow, to cause the snow to be immediately removed from the sidewalk fronting their property into the carriage-way of the street, and declare any person failing to comply with this requirement guilty of a misdemeanor, upon conviction of which such person is to be fined not less than five nor more than twenty dollars.

Before the judgment against the city in favor of Mrs. Norton became conclusive, the case was reviewed on appeal in this court. Norton v. City of St. Louis, 97 Mo. 537, 11 S. W. Rep. 242. In that case the city undertook to devolve upon the defendant here primary liability for the injuries Mrs. Norton received by reason of the unsafe and dangerous condition of the sidewalk on which she fell. We there held that it was the duty of the city to keep its sidewalks in a reasonably safe condition for persons traveling thereon, and that it could not evade or cast this duty upon others; and took occasion to say: "Conceding that the city has the power to cause obstructions upon the sidewalk to be removed at the expense of the owners of the ground fronting thereon (Charter, art. 3, § 21, par. 9). and that the ordinances requiring such owners immediately after any fall of snow to cause the same to be removed as a legitimate mode of exercising that power, yet the city could not by passing such an ordinance relieve itself of its duty to the plaintiff, and to the public traveling on its streets, of keeping its sidewalks in a reasonably safe condition for travelers thereon, or transfer or impose that duty upon another; nor can its liability for a failure to discharge that duty be made contingent upon the liability of the citizen to the city for a failure to discharge his duty to the city in the matter of removing the snow as required by ordinance. For a neglect of this duty of the citizen the city might impose such a penalty as would be calculated to secure its performance, if it has the power to impose such a burden; but it could not create a liability to a civil action for damages by a private individual against one who failed to discharge the city's duty in that behalf." While there is respectable authority for the position that a municipal corporation cannot impose upon the citizen the obligation to keep the public sidewalk in front of his premises free from obstruction by snow, etc., at his expense (Gridley v. City of Bloomington, 88 Ill. 554; Chicago v. O'Brien, 111 Ill. 532), the weight of authority is, however, the other way, and in favor of the position tentatively stated in the foregoing *dicta*, as to such power. (Many of the cases are cited in brief of plaintiff's counsel.) From the exercise of this power by the city through its ordinances creating such a duty upon the part of the defendant in the present case, counsel for plaintiff deduce the conclusion that, for a failure of the defendant to discharge its duty to the city under the ordinances, the city has a right over to recover back from the defendant the damages it was compelled to pay to Mrs. Norton. But this does not follow. The damages recovered by Mrs. Norton were for a breach of the city's duty to keep its streets reasonably safe from defects resulting from the operation of natural causes. To Mrs. Norton the defendant owed no such duty. The only duty it owed in regard to the sidewalk was to the city. That duty was created by the city in its ordinances, in which it prescribed for itself and its citizens the measure of damages for its neglect in the penalty imposed for their violation. The damages the city was compelled to pay may have been the result of its failure to promptly and efficiently enforce its ordinances. But it was its duty to enforce them, and not that of the citizen. The duty of the citizen is to obey, and, if he fail to obey, to pay the penalty which the city imposes for such failure, and not the damages which the city may be compelled to pay for its neglect to perform its duty. The doctrine on this subject is tersely stated in 2 Shear. & R. Neg. § 343, as follows: "An abutting owner, as such, owes no duty to maintain the street or sidewalk in front of his premises, and is not responsible for any defects therein which are not caused by his own wrongful act. He may consequently, like any other person using the sidewalk in front of his premises, recover for an injury from a defect therein against the city, whose duty it was to keep in repair. The fact that he violates a city ordinance, which requires abutting owners to remove snow and ice from the sidewalk in front of his premises within a certain time after their accumulation, does not render him liable to one injured by falling upon such snow or ice nor to the city which had suffered judgment for the same injury." In support, see Kirby v. Association, 14 Gray, 249; Vandyke v. Cincinnati, 1 Disn. 532; Heeney v. Sprague, 11 R. I. 456; Flynn v. Canton Co., 40 Md. 312; Moore v. Gadsden, 93 N. Y. 12; City of Hartford v. Talcott, 48 Conn. 526; City of Keokuk v. Independent Dist. of Keokuk, 53 Iowa, 352, 5 N. W. Rep. 503; 2 Black, Judgm. § 575; 2 Dill. Mun. Corp. (4th Ed.), §§ 1012, 1035. We have found no case in conflict with the doctrine thus stated. The case of Borough of Brookville v. Arthurs, 130 Pa. St. 501, 18 Atl. Rep. 1076, certainly is not; for there the right to recover by the borough is predicated expressly upon an agreement, for a good consideration to keep the sidewalk in repair. The demurrer was properly sustained, and the judgment of the circuit court is affirmed.

GUARDIAN AND WARD.

ENCROACHMENT ON PRINCIPAL.

The guardian "is bounden by law, that the heir be well brought up, and that his evidences be safely kept."[1] His primary duty being to support, maintain and educate his ward, the primary fund, the first in order at his disposal, for this purpose, consists of the income and profits of his ward's property.[2]

In performing this duty, he is to be governd by the extent of this fund, rather than by the style of life the ward has been accus

[1] Coke on Litt., 89 *b*.

[2] Clark v. Montgomery, 23 Barb. 464.

tomed to, although he need not prefer mere economy to the welfare and comfort of the child, being allowed to anticipate the income of one year to supply the deficiency of another, as well as justified in looking at future and probable resources, and treating increased value as income.[3]

Within the income and for purposes of maintenance and education, a guardian has large and liberal discretion, the *bona fide* exercise of which will not usually be reviewed, being subject only to the general rule of the common law, in most of the States formulated into statute, that he "shall manage the estate frugally and without waste."[4] But when he attempts to go beyond the income, he finds, in case his ward's property consists of real estate, that he must proceed (and that very strictly), in accordance with the statute in such case made and provided. And while, as regards the personal property of his ward, he is not thus hedged in by statute, yet any encroachment on such personal property fund will meet with resistance from the courts, who regard such proceedings with great jealousy.[5]

It is even said to be the rigid rule of the common law that the guardian cannot encroach on the principal, and that in two States, the Carolinas, such encroachment is held to be illegal under any circumstances.[6] This statement of the text writers seems hardly borne out by the decisions. In South Carolina a guardian is "not permitted to expend upon the maintenance and education of his ward more than the income of the estate, *without the intervention of the court.*"[7] And it is further stated to be "a well-settled rule that the guardian is not entitled to break in upon the capital of his ward for his subsistence, *except under peculiar circumstances*, and generally is limited within the income."[8] In North Carolina the decisions place encroachment on principal on the same plane as sales of ward's real estate,[9] and are based upon the statute of that State.[10]

As to any general rule of the common law, the statement seems to be founded on Walker v. Wetherell, 6 Ves. 473, as a leading case. There it was said by Sir William Grant: "My impression is, that the rule has been never to permit trustees, of their own authority, to break in upon the capital. I am not aware that the court has ever sanctioned that conduct in a trustee. It very rarely has occurred that the court has broken in upon the capital for the mere purposes of maintenance, though frequently for the purpose of putting the child out in life; but as to mere maintenance, I doubt it, even upon a petition presented. It is a great misfortune if the capital is so small as not to leave a comfortable maintenance and education; but what can the court do? It is better that an individual should suffer a hardship, than that a general rule of the court should be broken through in a point that would endanger the interests of all children."

It is argued by those who construe the doubt thus expressed into a rule limiting the guardian to the income except in extraordinary cases of advancement, that the object of the rule is to protect the property of the children, that it ties the hands of the guardian against improvident expenditures, and removes from him any inducement to invent artificial wants whereby he might be enabled to fritter away the ward's patrimony; that if the outlay exceeded the income year after year, the guardian might thus produce an accumulation of arrears in his favor so as to make necessary an encroachment on the principal if not a sale of the real estate.[11]

On the other hand, this rule has been characterized as regarding "nothing but the 'mint, anise and cumin,' while neglecting weightier matters."[12] And Chancellor Kent, referring to the aforesaid leading case, says: "The answer to be given is that such allowance is within the power and under the discretion of the court, and may in many cases be as fitly and properly made for maintenance and education as for advancement. It may be much more so; for an advancement might not be of much use to a child brought up in

[3] Schouler on Dom. Rel. § 337; Field on Guard. and Ward, § 117.

[4] Gott v. Culp, 45 Mich. 265, 2 Prob. Rep. 64; Preble v. Longfellow, 48 Me. 279, 77 Am. Dec. 227.

[5] Gary's Probate Law, § 831.

[6] Field, § 122.

[7] Villard v. Roberts, 2 Strob. Eq. (S. C.) 40, 49 Am. Dec. 654.

[8] McDowell v. Caldwell, 2 McCord's Ch. (S. C.) 43, 16 Am. Dec. 635.

[9] Patton v. Thompson, 2 Jones' Eq. (N. C.) 411, 67 Am. Dec. 222.

[10] Barnes v. Ward, Busb. Eq. (N. C.) 93, 57 Am. Dec. 590.

[11] Perry on Trusts, § 612.

[12] Hobbs v. Harlan, 10 Lea (Tenn.), 268, 43 Am. Rep.

ignorance and poverty."[13] And it is now well established that courts have the power to apply the principal fund for the maintenance and benefit of the ward. But such power is to be exercised with greatest caution and on proper petition.[14] Bearing in mind that, as a general rule, such payments are discountenanced, it follows that an allowance will not be made where the income is sufficient to suitably maintain and educate the ward; nor where the ward is able to maintain himself. Neither will it be allowed where any fit relative or friend is willing to assume maintenance without charge.[15] The fact that a child has property does not relieve the father from supporting it, if he be of sufficient ability to do so, and he will not be allowed any of the principal, and in some cases may be denied even the income of the child's estate. This rule, however, does not extend to mothers, unless it appears that the child has been supported without any intention of demanding compensation therefor.[16]

No set rules have been, and likely never will be, formulated for the regulation of allowances from principal, each case resting on its own merits. It is apparent, however, that in the exercise of their discretion, courts have had regard, first to the value and condition of the estate, and secondly, to the present circumstances and future welfare of the ward. Thus, where the estate has been small, the whole of it has been given to the person maintaining the child. And, as a matter of course, allowance has been made where the income is inadequate for reasonable nurture and support. It has also been allowed in cases where the ward has considerable expectancy, and where his estate has not yet been reduced to possession.[17]

Regarding the second reason for action, courts have seemingly been much more willing to authorize an expenditure of the principal fund in cases where such allowance would beneficially affect the future welfare of the child, as to pay his entrance fee as apprentice, educate him for a profession, establish him in business. Such allowances are looked upon, not as consuming or extinguishing the principal, but merely as converting it into another and useful form.[18]

As to maintenance, allowances have always been granted in cases of strong necessity, as in case of protracted sickness, where the ward is suffering for the necessaries of life, where he is an invalid or mentally incompetent. And where the parents are unable to furnish reasonable support, allowance has been made, and in doing so, regard has been had for the family to which the child belonged, in some cases increasing the amount for the benefit of the family. Some courts have even gone further, and, seemingly eager to present a modernized form of "guardian in chivalrie," have allowed young lady wards small sums of spending money in addition to regular maintenance from income.[19]

While it is thus clearly the law that encroachment on principal will be allowed in certain cases, on proper petition, for future maintenance or advancement, the doctrine of ratification of past expenditures is not so well settled. Many courts, recognizing the rule to be, that the guardian cannot exceed the income without leave of the court, insist that the discretion to break into the *corpus* is intrusted to the court and denied to the guardian; that it is the duty of the guardian to procure an order allowing such encroachment, and that this duty exists without statute; that if he neglect this and break in on the capital without authority, he does so at his peril. Nor will they accept as an excuse that the charges are reasonable, nor admit that the fact that the income is insufficient, varies the principle.[20] Others, however, relent sufficiently to ratify expenditures when it is clearly made out that they were for actual necessaries, and satisfactory reasons given why an order was not applied for; or where the facts shown would have entitled the guardian to such an order in the first instance.[21] And we find high authority asserting that "allowance for past maintenance is

[13] *Re* Bostwick, 4 Johns. Ch. 100.

[14] *Re* Kane, 2 Barb. Ch. 375; 1 Blackstone, 463.

[15] Perry, § 618; Schouler, § 316.

[16] Guion v. Guion, 16 Mo. 48, 57 Am. Dec. 224; *Re* Besondy, 32 Minn. 385, 50 Am. Rep. 581; Whipple v. Dow, 2 Mass. 418.

[17] Story's Eq. Juris. § 1355; Perry, § 624.

[18] Gott v. Culp, *supra*.

[19] Williamson v. Berry, 49 U. S. 495; Barnes v. Ward, *supra;* Schouler, § 338.

[20] Bond v. Lockwood, 33 Ill. 212; Beeler v. Dunn, 3 Head, 87, 75 Am. Dec. 761; Story, § 1355; Hobbs v. Harlan, Patton v. Thompson, *supra*.

[21] Olson v. Thompson, 77 Wis. 666; Davis v. Harkness, 1 Gilm. (Ill.) 173; Highland v. Baxter, 98 N. Y. 610; Maupin v. Delaney, 5 Dana (Ky.) 589, 30 Am. Dec. 699.

within the rules and practice of the court."[22] This power has been exercised in cases of sickness, personal injury requiring surgical treatment, death and consequent funeral expenses, failure of crops or of income, where ward's health requires removal, and like unforeseen cases, but in general all such ratifications are limited to cases of necessity.[23]

From these various cases we may safely draw the conclusion that a guardian is not permitted to encroach on the principal fund of his ward without leave of the court, on proper petition presented, except in case of extreme and urgent necessity. And it seems a just and proper rule, one which ought not to be relaxed. A cautious guardian will procure the proper order for his own safety. With a careless guardian, should not the personal property of the ward be as safely guarded and protected as his real estate?

EMIL BAENSCH.

[22] Chancellor Kent in *Re* Bostwick, *supra*.
[23] Moyer v. Fletcher (Mich.), 23 N. W. Rep. 198; 3 Wait's Act. & Def. 554.

CONSTITUTIONAL LAW—RIGHT TO CONTRACT.

COMMONWEALTH V. PERRY.

Supreme Judicial Court of Massachusetts, Dec. 2, 1891.

St. Mass. 1891, ch. 125, § 1, which provides that "no employer shall impose a fine upon or withhold the wages, or any part of the wages, of an employee engaged at weaving, for imperfections that may arise during the process of weaving," violates Const. Mass. art. 1, which declares the inalienable right "of acquiring, possessing and protecting property," since this includes the right to make reasonable contracts.

KNOWLTON, J.: This is an indictment under the statute of 1891, ch. 125, the first section of which is as follows: "No employer shall impose a fine upon or withhold the wages, or any part of the wages of an employee engaged at weaving, for imperfections that may arise during the process of weaving." Section 2 provides a punishment for a violation of the provisions of the statute by the imposition of a fine of not exceeding $100 for the first offense, and not exceeding $300 for the second or any subsequent offense. The act recognizes the fact that imperfections may arise in weaving cloth, and it is evident that a common cause of such imperfections may be the negligence or want of skill of the weaver. When an employer has contracted with his employee for the exercise of skill and care in tending looms, it forbids the withholding of any part of the contract price for non-performance of the contract, and seeks to compel the payment of the same price for work which in quality falls far short of the requirements of the contract as for that which is properly done. It does not purport to preclude the employer from bringing a suit for damages against the employee for a breach of the contract, but he must pay in the first instance the wages to which the employee would have been entitled if he had done such work as the contract called for. It is obvious that a suit for damages against an employee for failure to do good work would be in most cases of no practical value to the employer, and a theoretical remedy of this sort does not justify a requirement that a party to such a contract shall pay the consideration for performance of it when it has not been performed. The defendant contends that the statute is unconstitutional, and it becomes necessary to consider the question thus presented.

The employer is forbidden either to impose a fine or to withhold the wages or any part of them. If the act went no further than to forbid the imposition of a fine by an employer for imperfect work, it might be sustained as within the legislative power conferred by the constitution of this commonwealth, in chapter 1, § 1, art. 4, which authorizes the general court "to make, ordain, and establish all manner of wholesome and reasonable orders, laws, statutes, and ordinances, directions and instructions, either with penalties or without, so as the same be not repugnant or contrary to this constitution, as they shall judge to be for the good and welfare of this commonwealth, and for the government and ordering thereof, and of the subjects of the same." It might well be held that if the legislature should determine it to be for the best interest of the people that a certain class of employees should not be permitted to subject themselves to an arbitrary imposition of a fine or penalty by their employer, it might pass a law to that effect. But when the attempt is to compel payment under a contract of the price for good work where only inferior work is done, a different question is presented. There are certain fundamental rights of every citizen which are recognized in the organic law of all our free American States. A statute which violates any of these rights is unconstitutional and void, even though the enactment of it is not expressly forbidden. Article 1 of the declaration of rights of the constitution of Massachusetts enumerates, among the natural, inalienable rights of men, the right "of acquiring, possessing, and protecting property." Article 1, § 10, of the constitution of the United States provides, among other things, that no State shall pass "any law impairing the obligation of contracts." The right to acquire, possess, and protect property includes the right to make reasonable contracts, which shall be under the protection of the law. The manufacture of cloth is an important industry, essential to the welfare of the community. There is no reason why men should not be permitted to engage in it. Indeed the statute before us recognizes it as a legitimate business into which anybody may freely

enter. The right to employ weavers, and to make proper contracts with them, is therefore protected by our constitution; and a statute which forbids the making of such contracts, or attempts to nullify them or impair the obligation of them, violates fundamental principles of right which are expressly recognized in our constitution. If the statute is held to permit a manufacturer to hire weavers and agree to pay them a certain price per yard for weaving cloth with proper skill and care, it renders the contract of no effect when it requires him, under a penalty, to pay the contract price if the employee does his work negligently, and fails to perform his contract. For it is an essential element of such a contract that full payment is to be made only when the contract is performed. If it be held to forbid the making of such contracts, and to permit the hiring of weavers only upon terms that prompt payment shall be made of the price for good work, however badly their work may be done, and that the remedy of the employer for their derelictions shall be only by suits against them for damages, it is an interference with the right to make reasonable and proper contracts in conducting a legitimate business, which the constitution guaranties to every one when it declares that he has a "natural, inalienable right" of "acquiring, possessing, and protecting property." Whichever interpretation be given to this part of the act, we are of opinion that it is unconstitutional; and, inasmuch as the instructions of the judge permitted the jury to find the defendant guilty on the second count, a new trial must be granted.

We do not deem it important to consider the other exceptions taken by the defendant, further than to say that we are of opinion that the motion to quash was rightly overruled. For the cases supporting the view we have taken, and for a further discussion of the principles involved in the decision, see Godcharles v. Wigeman, 113 Pa. St. 431, 6 Atl. Rep. 354; State v. Goodwill (W. Va.), 10 S. E. Rep. 285; *In re* Jacobs, 98 N. Y. 68; People v. Marx, 99 N. Y. 377, 2 N. E. Rep. 29; People v. Gillson, 109 N. Y. 389, 17 N. E. Rep. 343; Millett v. People, 117 Ill. 294, 7 N. E. Rep. 631. Exceptions sustained.

NOTE.—There is naturally a lack of direct authorities upon the question presented in the principal case, though outside of the case of Hancock v. Yaden, 23 N. E. Rep. 253, S. C., 30 Cent. L. J. 192, the few authorities that are to be found seem favorable to the conclusion of the Massachusetts court. The latter, however, seem to overlook the case of West Virginia v. Fire Creek Co., 6 L. R. A. 369, which is in line with the position taken by it, where it was held that a statute which prohibits persons and corporations engaged in mining and manufacturing, and interested in selling merchandise and supplies to the employees at a greater per cent. of profit than they sell to others not employed by them, is unconstitutional and void as being "an unjust interference with the rights, privileges and property of both the employer and employee, and places upon both the badge of slavery by denying to the one the right of managing his own private business, and assuming that the other has so little capacity and manhood as to be unable to protect himself or manage his own private affairs."

It will be interesting to review the reasons urged by Holmes, J., who dissents in this case. He contends that taking the statute literally, it is not infringed, and there is no withholding of wages when the employer only promises to pay a reasonable price for imperfect work, or a price less than the price paid for perfect work, and does pay that price in fact. The prohibition, if any, he contends, must be found in the words of the constitution, either express or implied, upon a fair and historical construction. What words, he asks, of the United States or State constitutions are relied on? He thinks the statute cannot be said to impair the obligation of contracts made after it went into effect, nor does he see how it interferes with the right of acquiring, possessing and protecting property any more than the laws against usury or gaming. He says: "It might be urged, perhaps, that the power to make reasonable laws impliedly prohibits the making of unreasonable ones, and that this law is unreasonable. If I assume that this construction of the constitution is correct, and that speaking as a political economist I should agree in condemning the law, still I should not be willing or think myself authorized to overturn legislation on that account, unless I thought that an honest difference of opinion was impossible or pretty nearly so. If the statute does no more than to abolish contracts for a *quantum meruit* and recoupment for defective quality not amounting to a failure of consideration, I suppose that it only put an end to what are, relatively speaking, innovations in the common law, and I know of nothing to hinder it."

The dissenting judge believes that this act was passed because the operatives, or some of them, thought that they often were cheated out of a part of their wages under a false pretense that the work done by them was imperfect, and persuaded the legislature that their view was true. If it was true he cannot doubt that the legislature could deprive the employers of an honest tool which they were using for a dishonest purpose, and he hesitates to pronounce the legislation void as based on a false assumption, since he knows nothing of the matter, one way or the other. He cites approvingly, Hancock v. Yaden, *supra;* Slaughter House Cases, 16 Wall. 36.

CORRESPONDENCE.

LEGISLATIVE POWER TO ABOLISH GRAND JURY.

To the Editor of the Central Law Journal:

In your number of January 15, I notice a communication on the subject of the legislative power to abolish grand juries. I beg to call your correspondent's attention to Hurtado v. California, 110 U. S. 516, in which the Supreme Court of the United States held that the power existed. See also Preper v. Illinois, 116 U. S. pp. 264, 265, as to the second amendment, which falls within the same class as the fifth.

GEO. HOADLY, JR.

Cincinnati, Jan. 17.

JETSAM AND FLOTSAM.

POLES AND WIRES IN STREET.—We referred last month to the decision of the Supreme Court of Michigan that poles and wires set up in a street for the purposes of an electric railway did not impose a new

burden upon the land for which compensation must be made to the owner of the soil. 14 N. J. L. J. 294, referring to Detroit City Railway v. Mills, 48 N. W. Rep. 1007. It will be remembered that Vice Chancellor Van Fleet, in Rapid Transit Street Railway Co. v. Halsey, 20 Atl. Rep. 859, in deciding that the poles and wires for a street railway did not impose a new burden, distinguished between the use of the streets for this purpose and the use of them for a telegraph or telephone line, and said it was because the use for this purpose "differs so essentially from the ordinary and general use that the general current of authority, with an exception in Massachusetts, has declared that it does not come within the public easement." This remark has not the force of a decision, but it is confirmed by a recent decision of the Supreme Court of Mississippi, in Stowers v. Postal Cable Company (May 4th, 1891), 9 South. Rep. 356, 12 L. R. A. 864. The court said: "There is some conflict in the authorities, but the decided weight is to the effect that telegraph lines form no part of the equipment of the public street, but are foreign to its use, and that where the abutting owner is the owner of the fee to the center of the street he is entitled to additional compensation for the additional burden upon his land," citing cases on both sides. It does not appear whether the plaintiff owned to the middle of the street or not, but the court took pains to confirm a remark made in a previous case, that there was no difference in right in cases where the owner of abutting land owns the fee to the middle of the street and those in which the fee is in the public, and it was decided that permission given by the municipality to set up the line did not affect the plaintiff's right of property, and that an injunction should issue.

Among the cases cited in favor of this decision was Broome v. N. Y. & N. J. Telegraph and Telephone Co., 42 N. J. Eq. (15 Stew.) 141, but a careful examination of the New Jersey cases will show that they do not sustain the proposition for which they are cited, and that the decisions rest upon the fact that the statute expressly provides that poles shall not be set up without the consent of the land owner. In the case last referred to, the company had not even obtained the consent of the municipality, and had not a shadow of authority for constructing their lines, and, in another case, Roake v. Am. Telephone Co., 41 N. J. Eq. (14 Stew.) 35, Chancellor Runyon referred with approval to the decision in Massachusetts, on the other side of the question, and declined to grant an injunction against stretching wires in front of a man's land, saying that the statute applied only to the erection of the poles.

The question has not yet been definitely decided in New Jersey, and in other States there are strong opinions on both sides. If the question depends on the purpose for which the wires are used, the electric light wire, intended for lighting the street, must certainly be admitted, as well as the wire for the electric railway. The fire alarm telegraph wire is such a public use as can hardly be excluded, and it does not seem likely that the telegraph and telephone, used for the transmission of intelligence more rapidly than it can be carried by the mail wagon or the messenger boy, will be always regarded as foreign to the proper purposes of a public street or highway. See Pierce v. Drew, 136 Mass. 75, and Julia Building Association v. Bell Telephone Co., 88 Mo. 258, 5 Western Rep. 357. Cases on both sides of the question are referred to in Lewis on Em. Dom., § 131; 2 Dill. Mun. Corp. (4th ed.), §§ 698, 698*a*, and Thompson on Electricity, p. 18. See, also, Elliott on Roads, 533-536. See, also, a late case in favor of the land owner—Western Union Telegraph Co. v. Williams, 86 Va. 696, 11 S. E. Rep. 106; 2 Am. R. R. & Corp. Rep. 258, with a note by Mr. Lewis.

BOOK REVIEWS.

BISHOP ON MARRIAGE, DIVORCE AND SEPARATION.

The double purpose of this work, as stated by the author, "is to present the subject of a preceding one in a new and improved form, and to introduce the practitioner to available methods of investigation and labor productive of higher results than have been common heretofore."

The original one volume edition of Bishop on Marriage and Divorce was given to the public nearly forty years ago. The present two volume work is in effect a third edition, retaining the entire larger ground and adding thereto the promise to marry and the breach of it, seductions of husband and wife, and various minor topics. Beyond the fact that this is a complete treatise upon the law of marriage, divorce and separation, bringing down "the entire subject as appearing in the utterances and discussions of the courts to the present date," a striking and noteworthy feature consists in what the author terms "a new system of legal exposition." This system, which can best be stated in the words of the author, "consists of carrying each question into the light of, first, the entire subject; secondly, the entire legal system; thirdly, those laws of our earthly existence which man has no power to change; and lastly, those technical rules which have become established through the judicial doctrine of *stare decisis;* then of introducing into the problem all the considerations which are relevant, and especially not overlooking any, and thereby determining and writing down what, in fact, the judicial mind of our own country and age, when duly made cognizant of all, will hold upon the several questions." The author also claims that the new system "does not attempt to bend or seduce away any mind from former convictions; its aim is the far higher one, to induce, by all justifiable persuasions, the reader to look, not solicitous about the result of the looking. It recognizes the fact that our conflicts of judicial opinion do not result in any considerable degree from real differences, but almost entirely from the overlooking of things by judges, who, if they had all before their thoughts, would decide in harmony. If a bench of judges look at a white sheet of paper with normal and naked eyes, one does not say that it is green, another that it is yellow, and another that it is blue; but if, unperceived, different glasses are interposed between the several eyes and the paper the results will vary with the natures of the glasses." In the introduction to the work the reader will find a more detailed and satisfactory statement of what the new system is, the need for the new system, the importance of abandoning the reasonings of individual judges and text writers for those of the law, the advantages to the practitioner of substituting in his practice the new system for the old, and also the author's own uses of the new system in legal writings.

In the examination of the work itself one cannot but be impressed with the profundity of thought and the careful search for the truth exhibited by the author in the consideration of its subjects. He is plainly not only a law writer, but a philosopher; not a mere digester of authorities, but beyond and above all else a student of them. It would be impossible within the

limits of this notice to give anything like a fair outline of the contents of these two bulky volumes. For the enlightenment of those unacquainted with it, we will state its chief subdivisions. First. How marriage is constituted and what are its nullities. Second. The evidence of marriage. Third. Non-legal separations and breaches of marriage rights and duties. Fourth. The interventions of law between husband and wife other than by judicial divorce. Fifth. Judicial divorces. Sixth. The judicial locality for matrimonial suits, including the conflict of divorce laws. Seventh. General defenses. Eighth. General procedure. Ninth. Ancillary proceedings relating to the wife's maintenance, the property and the children. Tenth. Specific divorce and nullity suits as to the pleadings, evidence and practice. Eleventh. The sentence and its force and stability. Twelfth. The resultings from the divorce.

Within the above subdivisions are many chapters treating in detail of specific points within each subhead. That the work is in every respect beyond substantial criticism we have no hesitation in saying. Mr. Bishop demonstrates very clearly that he is not only a writer, but a keen, close student of the philosophy of the law. This work, if he had written no other, would justify the high estimation in which he is held by the profession as a teacher of the law. It should be in the library of every practicing attorney, not only for practical use in the determination of questions within its scope, but also as a valuable study of the theory and art of arriving at legal conclusions.

The two volumes are printed and bound in first-class style, have a good index. It is published by T. H. Flood & Co., Chicago.

BREWER'S OHIO CORPORATIONS.

Books of this character, having local value and intended principally for practitioners in the State for which they are published, have now become somewhat common, many of the States being provided with such a work; but we are told that when the first edition of "Ohio Corporations" appeared no book existed which undertook to furnish for any State what that book did for Ohio. The fact that its features have been so generally adopted, and that it has now gone through three editions is convincing evidence of its value to the Ohio practitioner.

In this new edition will be found the constitutional provisions and statutes in force to Jan. 1, 1892, relating to private corporations, notes of nearly five hundred decisions on corporation matters from the Ohio Supreme Court Reports, including the 47th Ohio State, and from the four volumes of Ohio Circuit Court Reports and 354 pages of the fifth volume of that series; a statement of the law applicable to existing corporations having perpetual charters granted by the legislature under the old constitution, with citations of decisions to the present time, besides the revised list of forms for organizing, managing and winding up all kinds of corporations other than municipal. At the head of each form is a reference to the statute to which the form relates. These forms have been adopted by the Secretary of State, under authority vested in him by section 3236, and are now used by the State department. The work would seem to be invaluable to all who are interested in the corporation laws of Ohio. The authors are A. T. Brewer and G. A. Laubscher, of the Cleveland Bar, and the publishers are Robert Clarke & Co., Cincinnati.

BOOKS RECEIVED.

THE GREEN BAG: A Useless but Entertaining Magazine for Lawyers. Edited by Horace W. Fuller. Volume III, covering the year 1891. The Boston Book Company, Boston, Mass.

LAWYERS' REPORTS, ANNOTATED. Book XII. All Current Cases of General Value and Importance decided in the United States, State and Territorial Courts, with full Annotation, by Robert Desty, Editor. Burdett A. Rich, Reporter. Rochester, N. Y.: The Lawyers' Co-Operative Publishing Company. 1891.

AMERICAN STATE REPORTS, Containing the Cases of General Value and Authority, Subsequent to Those Contained in the "American Decisions" and the "American Reports," Decided in the Courts of Last Resort of the Several States, Selected, Reported, and Annotated. By A. C. Freeman and the Associate Editors of the "American Decisions." Vol. 21. San Francisco: Bancroft-Whitney Company, Law Publishers and Law Booksellers. 1891.

GENERAL DIGEST OF THE DECISIONS of the Principal Courts in the United States, England and Canada. Refers to all Reports, Official and Unofficial, first published during the Year ending September, 1891. Including the L. R. A., the I. S. Com. and the U. S. Sup. Court Reports, L. Ed. Annual, being Volume VI. of the Series. Prepared and Published by the Lawyers' Co-operative Publishing Company, Rochester, N. Y. 1891.

THE AMERICAN DIGEST, Annual, (1891.) Being Vol. 5, of the United States Digest, Third Series Annuals. Also, the Complete Digest for 1891. A Digest of all the Decision of the United States Supreme Court, all the United States Circuit and District Courts, the Courts of Last Resort of all the States and Territories, and the Intermediate Courts of New York State, Pennsylvania, Ohio, Illinois, Rhode Island, Missouri and Colorado, U. S. Court of Claims, Supreme Court of the District of Columbia, etc., as Reported in the National Reporter System and Elsewhere, from September 1, 1890, to August 31, 1891. With Notes of English and Canadian Cases, *Memoranda*, of Statutes, Annotations in Legal Periodicals, etc., a Table of the cases Digested, and a Table of the Cases Overruled, Criticised, Followed, Distinguished, etc., During the Year. References to the State Reports Given by an Improved Method of Topical Citation. Prepared and Edited by the Editorial Staff of the National Reporter System. St. Paul, Minn. West Publishing Co. 1791.

HUMORS OF THE LAW.

Said an Alabama mother: "Never would I call a boy of mine 'Alias' if I had a hundred to name. Men by that name is allus cuttin' up capers. Here's Alias Thompson, Alias Williams, Alias the Night Hawk—all been took up for stealin'."

It was an old New England judge who once interrupted a lawyer in the midst of a spread-eagle speech by saying: "Mr. ——, I wish you would take a few feathers from the wings of your imagination and put them in the tail of your judgment."

CURIOUS CORONERS' VERDICTS.

Some of the coroners' verdicts in the country of fifty and sixty years ago are very curious. The following are some of the causes assigned for death:

"She come to her death by strangulation in testimony we have sit our hands and seal the day above wroten."

"Paul Burns came to his death by a mule running away with a waggon and being thrown therefrom."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE— Asphyxiation.— Deceased descended into the dug-out portion of a driven well to repair a pump, and in a few minutes he died from *asphyxia*, due to some deadly gas therein. This dug-out portion was but 10 or 12 feet deep, and deceased had no reason to suspect the presence of noxious gas therein: *Held*, that his death was due to external, violent, and accidental injuries, within the meaning of an accident policy insuring against that class of injuries.—*Pickett v. Pacific Mut. Life Ins. Co.*, Pa., 22 Atl. Rep. 871.

2. ADMINISTRATION.—Under Pub. St. R. I. ch. 217, § 1, providing that "in all civil causes at law the party prevailing shall recover costs, except where otherwise specially provided," where, in an action by an administrator, defendant prevails, and is entitled to costs, judgment therefor should be entered against the administrator *de bonis propriis*.—*Lynch v. Webster*, R. I., 23 Atl. Rep. 27.

3. ADMINISTRATION— Accounting by Executors.— A testator held contracts from brokers for the sale to him of certain railroad stock. He never demanded a delivery of the stock and at the time of his death the brokers had possession or control of the stock, and the larger part of the price was unpaid: *Held*, that the contracts, and not the stock, were the assets of the testator.—*Hitchcock v. Mosher*, Mo., 17 S. W. Rep. 638.

4. ADMINISTRATION—Pleading.—When, in a suit in a federal court to annul a will, the administrator, without objection, files an amended answer, alleging that the complainants have attempted by litigation in this and the State courts to have the will declared void, and have thus required large sums to be paid out as counsel fees, costs and expenses, which are debts against the estate, and that these items are properly chargeable against undevised property etc., this is sufficient to warrant the court in deciding upon what part of the estate these expenses are chargeable.—*Morgan v. Huggins*, U. S. C. C. (Ga.), 48 Fed. Rep. 3.

5. ADVERSE POSSESSION — Evidence.— *Held*, that the facts constitute such adverse possession as would bring it under the statute of limitations.—*Brown v. Brown*, Mo., 17 S. W. Rep. 640.

6. APPEAL—Collection of Taxes.—When a bill to enjoin a State officer from collecting taxes on the ground that the act imposing them is unconstitutional is dismissed, and an appeal is taken, the collection of the taxes pending the appeal leaves nothing for review, and requires the dismissal thereof; and it is immaterial that the taxes are paid under protest, upon the compulsion of writs, and that the party paying them declares his intention to sue for their recovery.— *Singer Manuf'g Co. v. Wright*, U. S. S. C., 12 S. C. Rep. 103.

7. APPEAL—Constitutionality of Act.—The fact that an action is against a public officer to recover fees illegally exacted by him does not give the supreme court jurisdiction of an appeal in the case where the amount in controversy is less than the jurisdictional amount prescribed by the statute. But where the constitutionality of the act providing for the recovery of such illegal fees is involved, the supreme court has jurisdiction of the appeal, under the statute of Indiana creating an intermediate appellate court.—*Benson v. Christian*, Ind., 29 N. E. Rep. 26.

8. APPEAL—Parties.—Rev. St. ch. 8, § 123, which provides that from a judgment of the county court an appeal shall be allowed in favor of a person who may consider himself aggrieved, does not apply so as to permit an appeal from a judgment recovered in an action in a circuit court against an administrator for a trespass by his intestate, where S, one of the nominal plaintiffs, sues out error in the name of the administrator.—*Sholty v. McIntyre*, Ill., 29 N. E. Rep. 43.

9. APPEAL—Plea in Abatement.—A decision of the superior court on a plea in abatement is final, and not reviewable on appeal.— *Rutland County Nat. Bank v. Johnson*, Mass., 29 N. E. Rep. 59.

10. APPEAL—Who may Appeal.—A guardian *ad litem* is a "party," within Code, art. 5, § 24, which restricts the right of appeal to the parties to a suit.—*Thomas v. Safe-Deposit & Trust Co.*, Md., 23 Atl. Rep. 3.

11. ARBITRATION AND AWARD.—Under an agreement to arbitrate partnership differences between two partners, an award containing an itemized statement of the partnership accounts, and finding a balance due by one partner to the other, secured by a pledge on the debtor's interest in a specified partition of the partnership property, in all of which the partners are equally interested, subject only to the lien of the pledge, is sufficiently definite to be enforced.— *Fulmore v. McGeorge*, Cal., 28 Pac. Rep. 92.

12. ASSAULT IN MAKING ARREST.—It is proper to refuse a request to charge that police officers in the town of S D have a right to carry arms, and that the carrying of them is not a violation of the State laws, the party requesting the charge producing no authority or evidence to sustain the position.—*Baker v. Barton*, Colo., 28 Pac. Rep. 88.

13. ASSIGNEE.—Under the act of 1887, the assignee of a claim against the United States may sue thereon in his own name.—*Emmons v. United States*, U. S. C. C. (Oreg.), 48 Fed. Rep. 43.

14. ASSOCIATION—Expulsion of Member.—When persons enter into a voluntary agreement and incorporate themselves into an association for the purpose of carrying out the objects and purposes of the association, and one of the members violates the rules of the association, and is fined and dismissed for non-payment of the fine, he cannot complain if the objects for which the association was created are not contrary to public policy, or some statute regulation, and the fine and dismissal were in pursuance of the rules and regulations of the association.—*State v. Stevedores' & Longshoremen's Benevolent Ass'n*, La., 10 South. Rep. 169.

15. ATTACHMENT— Evidence.— Where plaintiff, in trespass for attaching goods claimed to have been purchased by him from the attachment debtors, relies on his own testimony to prove that he was a purchaser in good faith, it is not error for the court to refuse to charge that the failure of plaintiff to produce the sellers as witnesses to prove the consideration is a circumstance of suspicion for the jury to consider.—*Pollack v. Harmon*, Ala., 10 South. Rep. 156.

16. ATTORNEY'S LIEN—Misuse of Papers.—An attorney in possession of papers of a railroad company upon which he has a lien for legal services cannot be compelled to permit an inspection thereof by the company's attorney, or to deliver them up to the court, upon a suggestion that he is now retained by persons bringing suits against the company upon causes of action arising out of transactions with which he was professionally connected while counsel for the company, and that his possession of the papers relating thereto would give him an undue advantage, when no particular suits are specified, and the attorney denies that he is prosecuting any action to which the papers in his possession relate either directly or indirectly.—*In re Hart*, U. S. C. C. (S. Car.), 48 Fed. Rep. 45.

17. BANKRUPTCY—Stock-board Membership.—A membership in a stock exchange is in its nature a personal privilege, subject to the restrictions imposed by the rules of the exchange, and a right to the property therein passes by an assignment in bankruptcy; and if by reason of the restrictions it is doubtful whether the membership possesses any value to the estate, the assignees must, within a reasonable time, elect whether they will accept or reject it.—*Sparhawk v. Yerkes*, U. S. C. C., 12 S. C. Rep. 104.

18 BANKS AND BANKING—Collection of Draft.—A bank which collects a draft sent to it by another bank for that purpose, with directions to remit the proceeds to a third bank for the owner's account, does not thereby become a trustee, so that the fund can be followed into the hands of a receiver, although it had become mixed with the other cash of the bank before his appointment; especially when it appears that the business was carried on, and money paid out, for several days after the collection was probably made.—*Merchants' & Farmers' Bank v. Austin*, U. S. C. C. (Ala.), 48 Fed. Rep. 25.

19. CARRIERS—Interstate Commerce Law.—A railroad company cannot justify itself in charging a greater compensation for a shorter than for a longer haul, under substantially similar conditions, contrary to the provisions of the interstate commerce law, on the ground that the rate is fixed by a joint tariff agreement with other roads.—*Osborne v. Chicago & N. Y. Ry. Co.*, U. S. C. C. (Iowa), 48 Fed. Rep. 49.

20. CARRIERS OF PASSENGERS—Contract.—The payment of first-class fare on a railway train does not entitle a passenger to carriage in a car equipped with adjustable reclining chairs and lavatory, and served by a special porter.—*St. Louis, A. & T. Ry. Co. v. Hardy*, Ark., 17 S. W. Rep. 711.

21. CASE STATED—Jurisdiction.—A case stated by a trustee and the holder of a mortgage given by such trustee, seeking to sustain the power of the trustee to give the mortgage in order to determine whether he would also have power to execute a new mortgage wherewith to pay it, is not within the provisions of Pub. St. ch. 192, § 23.—*In re Greene*, R. I., 28 Atl. Rep. 29.

22. COMMUNITY PROPERTY.—Where the community interest of a husband and his wife had been inventoried as such after his death, and was in course of administration when the wife died, her death would not withdraw her community interest from administration, and it also passed by such decree.—*Lawson v. Kelley*, Tex., 17 S. W. Rep. 717.

23. CONDITIONAL SALE—Rescission.—Where a delivery of machinery was made on condition that the vendee might approve of the same before sale, and, if satisfactory, should pay for the same in cash and notes, such payment was a condition precedent to the vesting of title in the vendee, and the transaction did not come within Sayles' Civil St. art. 3190*a*, providing that all reservation of title for purchase money shall be void as to the creditors of the vendee, unless such reservation be in writing, duly recorded.—*Hall & Brown Wood-Working Mach. Co. v. Brown*, Tex., 17 S. W. Rep. 715.

24. CORPORATIONS—Contract.—A corporation must have full and complete organization and existence as an entity, and in accordance with the laws to which it owes its origin, before it can assume its franchises, or enter into any kind of contract or business.—*McVicker v. Cone*, Oreg., 28 Pac. Rep. 76.

25. CORPORATIONS—Insolvency.—An insolvent foreign corporation, which is proceeded against under the New Jersey corporation act, §§ 70, 72, cannot raise the question whether the court acquired jurisdiction over it by a notice pursuant to an order of publication when it has moved to dismiss the bill for want of equity under a notice given pursuant to equity rules, par. 224; for that notice is equivalent to a demurrer, and constitutes an appearance in the suit.—*Albert v. Clarendon Land, Investment & Agency Co.*, N. J., 28 Atl. Rep. 8.

26. COUNTY BONDS—Overissue.—Where, under a statute, a county was authorized to issue bond, "not to exceed in all one hundred and fifteen thousand dollars," and a record of the number, date, and amount of each bond was to be kept, and the county issues bonds in excess of the amount named in the statute, the "overissue" bonds are invalid.—*Sutro v. Rhodes*, Cal., 28 Pac. Rep. 98.

27. COURTS—Disqualification of Judge.—Since the provision of Rev. St. Mo. 1889, § 4174, that in any criminal prosecution the judge shall be deemed incompetent to try the cause when the defendant shall file certain affidavits that the judge will not afford him a fair trial, applies to the St. Louis Court of Criminal Correction, under Crim. Code No. § 4303, providing that such Code shall be applicable to any court of record exercising criminal jurisdiction, that court being, under Rev. St. Mo. 1889, p. 2152, a court of record, and its judge having, in cases of felony, the powers of an examining magistrate.—*In re Bedard*, Mo., 17 S. W. Rep. 693.

28. COURTS—Jurisdiction in Foreclosure.—Civil Prac. Act Wash. T. § 48, providing that actions for the foreclosure of mortgages, among others, "shall be commenced in the county or district in which the subject of the action is situated," gives to a mortgagee whose mortgage covers several disconnected tracts of land in different counties and districts the right to foreclose as to all of them by a single suit in any county where one tract is situated.—*Stevens v. Ferry*, U. S. C. C. (Wash.), 48 Fed. Rep. 7.

29. COVENANT RUNNING WITH THE LAND.—A railway company obtained a right of way through land owned by a married woman in consideration of one dollar, and the covenants to maintain a depot, run daily trains, etc. The road-bed was abandoned, but not until after title to the property was acquired by the husband: *Held*, that the covenants, not being "made for the direct benefit of the property, or some part of it," as required by Civil Code, § 1462, did not run with the land, and the husband, not showing an express assignment of his wife's interest in the contract, and his wife having not joined in the action, cannot recover for failure on the part of defendants to perform.—*Lyford v. North Pac. C. R. Co.*, Cal., 28 Pac. Rep. 103.

30. CREDITORS' BILL.—The filing of a creditors' bill gives the creditor a lien on assets of the debtor in the hands of a receiver appointed in a prior suit brought by another creditor, superior to that of all the judgment creditors except the one who brought the prior suit.—*Russell v. Chicago Trust & Saving Bank*, Ill., 29 N. E. Rep. 37.

31. CRIMINAL EVIDENCE—Confession.—Where a father and two sons are on trial for murder, and the mother testifies that she told one of the sons that she had been induced to come to the jail where he was, and advise him to confess, by a threat of a mob to hang them all if she did not do so, and the son thereupon confessed, such confession is inadmissible, as made under a threat of violence.—*Wigginton v. Commonwealth*, Ky., 17 S. W. Rep. 634.

32. CRIMINAL EVIDENCE—Incest.—On trial for incest, acts of sexual intercourse prior to the specific act charged in the indictment may be proved by the State.—*Leforge v. State*, Ind., 29 N. E. Rep. 34.

33. CRIMINAL LAW—Carrying Weapons.—Under a statute which prohibits the carrying of concealed weapons, but excepts from its operation all "persons when upon a journey," a person comes within the exception who carries a pistol while engaged in carrying mail daily a distance of 30 miles.—*Hathcote v. State*, Ark., 17 S. W. Rep. 721.

34. CRIMINAL LAW—Rape.—*Held*, that the court erred in refusing an instruction that the ravished party must complain immediately, or as soon as opportunity can be had, that there had been a failure to prove that prosecutrix had done so, and that her concealment was inconsistent with defendant's guilt.—*State v. Patrick*, Mo., 17 S. W. Rep. 666.

35. CRIMINAL LAW—Rape.—On a trial for rape, evidence showing merely that defendant got into the bed of complaining witness, and while there took indecent liberties with her, is insufficient to justify conviction, since penetration is not shown.—*State v. Dalton*, Mo., 17 S. W. Rep. 700.

36. CRIMINAL PRACTICE—Writs of Error—In Criminal Cases.—Where an indictment in the St. Louis Court of Criminal Correction was quashed on the ground that the law under which it was drawn was unconstitutional such decisions might be reviewed on a writ of error on behalf of the State.—*State v. Burgdoefer*, Mo., 17 S. W. Rep. 646.

37. CRIMINAL TRIAL—Homicide—Accomplice.—An accomplice, jointly indicted, and as to whom the indictment has not been disposed of, can testify on behalf of the State against his co-defendant on a separate trial; and in such case the wife of the accomplice is a competent witness for the State.—*Adams v. State*, Fla., 10 South. Rep. 106.

38. CRIMINAL TRIAL—Witness—Criminating Testimony.—One who has taken part in a gambling game cannot be compelled to testify that the other players gambled, since such an answer would tend to criminate him.—*Minter v. People*, Ill., 29 N. E. Rep. 45.

39. DEED—Cancellation—Undue influence.—In actions to avoid a deed on the ground of inadequacy of consideration and undue influence arising from the relation of the parties, the burden is on the grantee to prove that it is equitable in every respect.—*Burke v. Taylor*, Ala., 10 South. Rep. 129.

40. DESCENT OF LAND—Heirs of Bastard.—G, a bastard, not legitimized by marriage, died in Texas, in 1836, leaving no wife or child. Land was patented to his heirs by virtues of a bounty warrant issued to him in 1338. His mother was living at his death, and plaintiffs are her legitimate heirs by her marriage to one D, after G's birth: *Held*, that G came within the class *bastardo espurio*, as defined by the Spanish civil law in force in Texas at his death, which law recognized the right of a mother to inherit from such child, and through her plaintiffs were entitled to the land.—*Pettus v. Dawson*, Tex., 17 S. W. Rep. 714.

41. DISSOLUTION.—Where a trust is sought to be dissolved by a woman who had created the same for the purpose of placing her property beyond the interference of her husband, from whom she is afterwards divorced, and it appears that her children have a beneficial interest in the trust fund, and have not assented to the termination, the court properly refused a dissolution.—*In re Thurston*, Mass., 29 N. E. Rep. 54.

42. DOWER—Enforcement — Limitations.—A husband contracted to convey land, but the wife did not join in the contract. The purchasers went into possession, and so remained. The husband died, and his children sued the wife for assignment of her dower, but the purchasers were not joined in the suit. Her dower was assigned, and 17 years afterwards action was brought to enforce her dower right in the land conveyed: *Held* that, as Rev. St. 1889, § 2306, made her inchoate dower absolute at the husband's death, and gave her right of action to enforce it, the action was barred by limitation.—*Long v. Kansas City Stock-yards Co.*, Mo., 17 S. W. Rep. 5

43. DOWER—When Right Vests.—A mortgage executed by plaintiff and her husband on the husband's land was foreclosed after the husband had conveyed the land to a third person, in which conveyance plaintiff did not join: *Held*, that the fact that the husband had no title at the time of the foreclosure did not prevent plaintiff's inchoate interest from vesting absolutely on the foreclosure sale under Rev. St. Ind. 1881, § 2508.—*Kalley v. Canary*, Ind., 29 N. E. Rep. 11.

44. EJECTMENT—Damages.—In an action for the mesne profits the expenses of the ejectment beyond those embraced in the taxed costs, such as fees paid to counsel, cannot be included in the damages.—*Poke v. Daly*, N. J., 23 Atl. Rep. 7.

45. EJECTMENT—Estoppel as a Defense.—In Missouri, a plea of estoppel is a sufficient defense in an action of ejectment, since equitable defenses may be set up in such actions.—*Clayburn v. McLaughlin*, Mo., 17 S. W. Rep. 692.

46. ELECTIONS—Ballots.—The words "Regular Prohibition Ticket," printed at the head and on the face of a ballot, are not such part of the ticket as renders it illegal under Pol. Code Cal. § 1191, providing that the word "For" shall comprise the top line of all tickets used at an election, as the ticket consists merely of the words showing for whom and for what office the ballot is cast.—*Coffey v. Lyman*, Cal., 28 Pac. Rep. 91.

47. EMINENT DOMAIN—Compensation.—In an action by a railroad company against the city of W for damages for taking under Acts Mass. 1886, ch. 331, providing for the construction of sewage-works, about three acres of plaintiff's land, in which there was a large quantity of gravel, plaintiff was allowed to show the damages to its adjacent land, but the court properly refused to allow plaintiff to show damages to its plant as a whole, since the gravel pit bore no such relation to the whole railroad that its severance would occasion any consequential damages. — *Providence & W. R. Co. v. City of Worcester*, Mass., 29 N. E. Rep. 56.

48. EVIDENCE — Authority of Agents.—In an action for goods sold to a general agent of defendants as members of a co-operative association, though the account filed is against the agent, where defendents admit in their answer that such agent was manager and clerk of such association, it is competent for such agent and others to testify that the goods were purchased pursuant to his authority for and were used by defendants. — *Liddell v. Sahline*, Ark., 17 S. W. Rep. 705.

49. EVIDENCE — Declaration and Admissions.— In a suit for the price of goods sold to one on the credit of defendant's decedent, it was error to admit in evidence a conversation had between plaintiff and his salesman in relation to whom the goods were to be charged.—*Espalla v. Richard*, Ala., 10 South. Rep. 137.

50. EVIDENCE— Parol.—An action on a written subscription to stock cannot be defeated by evidence of a prior or contemporaneous oral agreement that the stock was not to be issued, nor the subscriber held liable on his subscription. — *Wurtzbarger v. Anniston Rolling Mills*, Ala., 10 South. Rep. 129.

51. EVIDENCE—Record on Appeal.—On the retrial of a case that has been appealed and reversed, the bill of exceptions containing the testimony of a deceased witness given at the former trial is not competent evidence of the testimony of that witness, as it imports verity solely for the purpose of appeal on that trial, and for no other purpose.—*Fisher v. Fisher*, Ind., 29 N. E. Rep. 31.

52. EXECUTION — Exempt Property. — Under Mansf. Dig. Ark. § 3006, prescribing the method whereby a resident of the State, wishing to claim his exemption from execution, may have a *supersedeas* staying the sale, the petition is fatally defective where it does not allege that petitioner is a resident of the State of Arkansas.—*Feiner v. Bumgarner*, Ark., 17 S. W. Rep. 709.

53. EXECUTION—Sale.— The purchaser at execution sale of a trunk, which is afterwards found to contain municipal bonds belonging to the judgment debtor,

does not acquire any title to such bonds, since choses in action are not subject to the sale under execution, except where expressly made subject thereto by statute.—*Crawford v. Schmitz*, Ill., 29 N. E. Rep. 40.

54. FEDERAL COURTS—Bill of Exceptions.—In those districts where the custom prevails of entering judgment immediately upon the rendition of the verdict a bill of exceptions may be allowed and filed at the term in which the motion for a new trial is determined, although such action is taken at a term subsequent to the entry of judgment, and there is no order extending the time for allowing and filing the bill.—*Woods v. Lindvall*, U. S. C. C. App., 48 Fed. Rep. 73.

55. FEDERAL COURTS — Habeas Corpus. — A circuit court of appeals has no jurisdiction, in the absence of a statute expressly authorizing it, to award a writ of *habeas corpus* to be served outside of the circuit for which it sits, to secure the release of a person there held in custody.—*In re Boles*, U. S. C. C. App., 48 Fed. Rep. 73.

56. FEDERAL COURTS—Jurisdiction.—Whenthe jurisdiction of the circuit conrt arises only from the fact that the plaintiff and defendant are citizens of different States, suit may be brought, under Act Cong. Aug. 13, 1888, in the circuit court of the district in which either the plaintiff or the defendant resides; and where the defendant is a corporation organized under the law of another State, but maintaining an office in the State wherein the plaintiff resides, suit may be brought in the circuit court of the latter State.—*Minford v. Old Dominion Steam-Ship Co.*, U. S. C. C. (N. Y.), 48 Fed. Rep. 1.

57. FRAUDS, STATUTE OF—Agreement to Pay Debt of Another.—A verbal promise by the owners of buildings to pay the material-men for material furnished the contractor if the material-men would give him time, is within the statute of frauds if it appears that the material-men did not agree not to file a lien nor to release the contractor, and in fact that they had failed to take the steps requisite to entitle them to a lien.—*Parker v. Dillingham*, Ind., 29 N. E. Rep. 23.

58. FRAUDULENT CONVEYANCES. — Where a person largely in debt purchases lands in the name of his wife, but with his own funds, it will be regarded as a conveyance from him in fraud of creditors, but it will not be treated as void, the wife being considered a trustee for the benefit of her husband's creditors, and the lands will be subject to a lien by virtue of a judgment against the husband.—*Stix v. Chaytor*, Ark., 17 S. W. Rep. 707.

59. GAMING — "Pin Pool." — The game ordinarily known and designated as "pin pool" is not a gambling game, in the sense of the constitution and the law, and a city ordinance denouncing it as such is illegal.—*State v. Quaid*, La., 10 South. Rep. 153.

60. GARNISHMENT— Benevolent Associations. — Under the constitution and by-laws of a benevolent society it was the duty of the treasurers of its local branches to receipt for all payments made to their branches, and to make a monthly report, and at the same time remit to the society all moneys collected by them; and they were required to give bond to the society to cover all moneys that might be in their hands at any time: *Held*, that money paid to these treasurers by members of their respective branches upon assessments by the society, was held by them as trustees of the society, and was subject to garnishment as its property.—*Jepson v. International Fraternal Alliance*, R. I., 23 Atl. Rep. 15.

61. GUARDIAN AND WARD—Domicile.—A guardian appointed for a person as being *non compos mentis*, never exercised any conntrol over the person or estate of the ward, and the latter transacted his own business for several years, until the death of the guardian, and continued to do so thereafter, and accumulated considerable property: *Held*, that the mere appointment of the guardian did not prevent the ward from changing his domicile, he having sufficient mental capacity to do so.—*Mowry v. Latham*, R. I., 23 Atl. Rep. 13.

62. GUARDIAN AND WARD — Sale of Ward's Land.—Where a guardian presents to the court a petition for an order to sell his ward's land, and the sale is ordered and approved by the court, it is valid as against collateral attack, notwithstanding certain irregularities by which the purchaser got the land for less than its appraised value.—*Meikel v. Borders*, Ind., 29 N. E. Rep. 29.

63. HIGHWAY—Establishment—Prescription. —Where adjoining land-owners agree upon their division line, and establish a road supposed to be on the land of one of them, which road for 50 years is used by the subsequent owners of the land and by the public, the road cannot be closed by the owner of one of the tracts, when he finds by a resurvey that the road is on his land, instead of the adjoining land, as it was supposed to be.—*Bales v. Pidgeon*, Ind., 29 N. E. Rep. 34.

64. HOMESTEAD— Segregation of Portions. —A portion of a homestead loses its exemption from seizure and sale upon segregated from the rest.—*Curtis v. Des Jordins*, Ark., 17 S. W. Rep. 709.

65. HOMESTEAD—Waiver.— Act Ark. March 18, 1887, provides that the right of exemption shall not be lost by omission to select and claim a homestead before sale under execution: *Held*, that the right to exemption is a privilege which may be waived, and a purchaser of a homestead at execution sale, where no claim of exemption is made, takes a defeasible estate, which is a sufficient consideration for a note given for the purchase price.— *Snider v. Martin*, Ark., 17 S. W. Rep. 712.

66. HUSBAND AND WIFE— Post Nuptial Agreement. —A post nuptial agreement between husband and wife for the conveyance to him of her general fee simple estate in land upon condition that he sell his own land and with the proceeds improve hers, although made upon a sufficient consideration, is not enforceable, either in law or equity, against the wife and her heirs —*Shaffer v. Kugler*, Mo., 17 S. W. Rep. 698.

67. INJUNCTION — Erection of Fire Engine House.— A lot-owner cannot have a city enjoined from erecting a fire-engine house on an adjacent lot until compensation is made for the anticipated depreciation of his property in value in consequence of the noise and bustle incident to such structures, where no direct and special damage is shown.—*Van de Vere v. Kansas City*, Mo., 17 S. W. Rep. 695.

68. INJUNCTION—Organization of Town.—Where the inhabitants of a part of a county sought to be incorporated into a town have complied with all the requirements of the statute providing for such organization, and the commissioners have called an election, a court has no jurisdiction to enjoin such election, and a disobedience of such injunction is not punishhable as contempt.—*Guebelle v. Epley*, Colo., 28 Pac. Rep. 89.

69. INSOLVENCY — Discharge. —A person who purchases claims against an insolvent after his discharge cannot sue to set aside the decree of discharge on the ground of fraud, under Insolvent Act Cal. 1880, § 53, providing that such action may be maintained by any creditor of the insolvent "whose debt was proved or provable against the estate in insolvency" —*Sanborn v. Doe*, Cal., 28 Pac. Rep. 105.

70. INTOXICATING LIQUORS—Minors.—On a trial for having unlawfully given liquor to one M, a minor, it is error for the court to charge the jury that, "if you find from the evidence that a person other than defendant presented a bottle of whisky to a crowd of persons, in which * * * M, a minor was standing, and that such person ordered the bottle generally to be passed around to members of the crowd, * * * and M, who was a minor, received the bottle, and drank of it, whether from the hands of defendant or another person, every person who assisted to pass the bottle would be guilty of the offense, and you should convict defendant," since such charge makes the mere act of defendant in passing the bottle conclusive evidence that he

aided in the gift of the whisky to the minor.—*Miller v. State*, Ark., 17 S. W. Rep. 719.

71. JUDGMENT—Res Judicata.—It is not sufficient to conclude a party by a judgment in a former suit against his servant, agent, or employee, to which he was not a party of record, that he employed an attorney who was present for him, and participated in the trial; but it is essential that he should have openly intervened in the suit, assuming its direction and control for the prosecution or defense of some interest, or to avert a liability, which he might have been under, to indemnify defendant against an adverse judgment.—*Central Baptist Church & Society v. Manchester*, R. I., 23 Atl. Rep. 3[illegible].

72. JUDGMENT IN JUSTICE'S COURT — Filing Transcript.—The filing of an "abstract" of the judgment, which fails to show that a complaint was filed, that a summons was served, or that defendants appeared, is not a substantial compliance with Hill's Code Oreg. §§ 2103, 2104.—*White v. Espey*, Oreg., 28 Pac. Rep. 71.

73. LANDLORD'S LIEN— Chattel Mortgage.— Though plaintiff has a claim for rent, he cannot before judgment, maintain an action to set aside a chattel mortgage given by his tenant on hay grown on plaintiff's land, as in fraud of creditors.—*Briggs v. Austin*, N. Y., 29 N. E. Rep. 4.

74. LANDLORD'S LIEN — Goods in Warehouse.— The Code § 3069, provides that the landlord of any storehouse shall have a lien on the goods belonging to the tenant for his rent, superior to all other liens: *Held*, where the tenant turned out a quantity of goods in payment of a debt not connected with the business, to one having knowledge of the tenancy, that, since such sale was not in the usual course of business, it did not displace the lien.— *Weil v. McWhorter*, Ala., 10 South. Rep. 131.

75. LIFE INSURANCE—Transferred Risk.— Defendant contracted with another insurance company about to quit business to re-insure all the latter company's members who were then in good standing. The written request for insurance made by one of such members to defendant showed that it was not an application for new insurance, and defendant, in the policy issued thereon, referred to insured's application to the other company, and made it a part of its contract. The insurance also was for the same amount: *Held*, that the policy issued by defendant was a transferred risk.—*People's Mut. Assur. Fund v. Bacase*, Ky., 17 S. W. Rep. 630.

76. LIMITATION OF ACTIONS—Stock Subscriptions.— Limitation does not run as against subscriptions of capital stock, payable when called for, until a call is made.—*Glenn v. Priest*, U. S. C. C. (Mo.), 48 Fed. Rep. 19.

77. MANDAMUS TO JUDGE—Res Judicata.—Where application is made for a *mandamus* to compel a judge to settle a bill of exceptions, but the proceeding is dismissed for want of prosecution, a mandate will not issue against his successor to compel such settlement, since the original ruling of the judge is then a final determination.—*Fisher v. Smith*, Cal., 28 Pac. Rep. 94.

78. MANDAMUS TO SECRETARY OF STATE—Election of United States Senator.—Where there has been an election of a United States senator by the legislature, and afterwards the governor, holding that there is a vacancy in the office on account of the illegality of such election, signs an appointment or commission of a United States senator and requests the secretary of State to seal the same with the great seal of State, and to countersign it, it is the duty of the secretary to do so, and he has no right to refuse because he deems the governor's action illegal. If he refuses the performance of the duty, it may be required by *mandamus*.—*State v. Crawford*, Fla., South. Rep. 118.

79. MASTER AND SERVANT— Vice-Principal. — A foreman who is in charged of a gang of workman engaged in construction work on a railroad, with full power to hire and discharge men and direct them when and where and how to work, is a vice principal, notwithstanding that he occasionally lends a hand in the actual manual labor.— *Woods v. Lindvall*, U. S. C. C. App., 48 Fed. Rep. 62.

80. MINING LOCATION — Assessment. — Labor performed by the owner of a mine in constructing a wagon road thereto for the purpose of better developing and operating the same may be treated as a compliance with the law relating to annual assessment work.—*Doherty v. Morris*, Colo., 28 Pac. Rep. 85.

81. MORTGAGE—Absolute Deed.—Where a deed is absolute on its face, but the parties at the time of its execution sign a memorandum reciting that "Jones [the grantor] is to have the land again by deed whenever he pays all the amount borrowed, and other debts due me," such memorandum proves the deed to be in fact a mortgage.—*Rogers v. Jones*, Cal., 28 Pac. Rep. 97.

82. MORTGAGEE—Tax Title. — Although a mortgagee cannot assert a tax-title against the mortgagor, it is error to disregard his claim of entry under such title, in an accounting whereby it is sought to charge him with rents and profits, since, in that event, his accountability is not the same as if he had entered under the mortgage.—*Hall v. Westcott*, R. I., 23 Atl. Rep. 25.

83. MORTGAGE FORECLOSURE—Redemption.—A mortgagee who forecloses and buys in the land himself cannot have the land resold to satisfy the balance of his mortgage debt after it has been redeemed from the first sale by a junior incumbrancer.—*Anderson v. Anderson*, Ind., 29 N. E. Rep. 35.

84. MORTGAGE FORECLOSURE — Sale in Parcels.— Where a foreclosure decree directs the sale of the premises in parcels, and the sheriff first offers for sale the rents and profits to each parcel for seven years, and, receiving no bid, offers the fee of each parcel in succession, and then the fee of the whole tract, the sale is valid, as he is not bound to offer for sale the rents and profits of all the tracts together before offering to sell the fee.— *Carpenter v. Russell*, Ind., 29 N. E. Rep. 36.

85. MUNICIPAL CORPORATIONS — Assessments for Grading.—Under Laws 1872, p. 478, authorizing a town "by ordinance to levy and collect taxes" for street grading a general ordinance providing that on petition the council should order a street graded, "and shall also levy a special tax for the payment thereof," and an order of the council opening a street, does not constitute a levy.— *Town of Trenton v. Coyle*, Mo., 17 S. W. Rep. 643.

86. MUTUAL AID ASSOCIATION — Assessments.—In a mutual aid association, a particular method of notice of assessment falling due, having been agreed upon and made a part of the charter, is binding on all members.— *Maginnis' Estate v. New Orleans Cotton Exchange & Mutual Aid Ass'n*, La., 10 South. Rep. 180.

87. NEGLIGENCE — Dangerous Premises.—Where a child six years old was injured on a turn-table of a railway company while playing with other children, no employees being about, and the turn-table was only kept in place by an ordinary iron latch, which could be easily lifted, the company is liable for injuries received by the child while the table was turned by other boys, even though the employees of the company had always ordered children away when observed playing on the turn-table.— *Callahan v. Eel River & E. R. Co.*, Cal., 28 Pac. Rep. 104.

88. NEGLIGENCE—Defective Bridges.—A person who, not knowing that a bridge is defective, attempts to cross it with a traction steam engine, with water-tank and thresher attached, is not guilty of contributory negligence in so doing, as highway bridges have come to be commonly used for such purposes.—*City of Wabash v. Carver*, Ind., 29 N. E. Rep. 25.

89. NEGLIGENCE—Injuries to Passengers on Street Car.—Plaintiff was riding on the front platform of a street-car, and while passing around a curve, was thrown from the car. He testified that the rear platform was crowded, and he had to get on the front; that he had to stay there because the car seemed full

There was evidence for defendant that there was ample room to stand inside the car: *Held*, that an instruction was proper which authorized the jury to find plaintiff free from negligence in riding on the front platform if there was a reasonable necessity, real or apparent, for his doing so.—*Highland Ave. & B. R. Co. v. Donovan*, Ala., 10 South. Rep. 139.

90. NEGLIGENCE— Land-Owners — Lateral Support.—Under Civil Code Cal. § 832, giving the owner of land the right to excavate for building purposes, taking due precautions to sustain the adjacent land, and giving notice to the owner of his intentions, the excavator cannot recover for money expended in sustaining the adjacent land. The notice required does not impose a duty upon the adjacent property owner, for the neglect of which a liability could be created in favor of the excavator.—*First Nat. Bank v. Villegia*, Cal., 28 Pac. Rep. 97.

91. NEGLIGENCE—Liability for Servant's Torts.—One is liable for personal injuries caused by the negligent discharge of fire-works by another as his agent.—*Colvin v. Peabody*, Mass., 29 N. E. Rep. 59.

92. NEGOTIABLE INSTRUMENTS — Judgment.—A judgment is the highest evidence of a debt, and the title merges in the judgment. A judgment neither creates, adds to, nor detracts from a debt. It only declares its existence, fixes the amount, and secures to the creditor the means of enforcing it. A judgment on a promissory note extinguishes its negotiability. It is only transferable as other credits are.—*Newman v. Irwin*, La., 10 South. Rep. 181.

93. NUISANCE — Electric Light Plant.—*Held*, that the evidence did not prove more annoyance than is usually incident to a residence in a city, or such annoyances as could not be prevented by labor and money, for which there was redress at law. — *English v. Progress Electric Light & Moter Co.*, Ala., 10 South. Rep. 134.

94. OFFICE AND OFFICERS — Right to Emoluments.—The successful claimant has a right to the emoluments and perquisites, where an incumbent illegally held possession by means of judicial proceeding.—*State v. Holmes*, La., 10 South. Rep. 172.

95. PLEADING — Illegal Contract.— The illegality of a contract alleged as the ground of the action, in order to be available as a defense, must either appear from plaintiff's own pleadings or proof, or be affirmatively pleaded by defendant.—*Buchtel v. Evans*, Oreg., 28 Pac. Rep. 67.

96. PRESCRIPTION — Right of Way.—One who has enjoyed a right of way over the lands of another adversely for more than 30 years has a right of way by prescription, and can enjoin the land-owner from obstructing it.—*Sheeks v. Irwin*, Ind., 29 N. E. Rep. 11.

97. PRINCIPAL AND SURETY—Extention of Time.—Where a maker pays $100 on a note, and the holder agrees to wait a certain time for the balance, and there is no additional valuable consideration to support the agreement, the surety is not discharged.—*Hughes v. Southern Warehouse Co.*, Ala., 10 South. Rep. 133.

98. PUBLIC LAND— Pre-emption Certificate.—The land department has no authority of its own motion to set aside or cancel the final certificate of a settler under the pre-emption law. — *American Mortg. Co. v. Hopper*, U. S. C. C. (Oreg.), 48 Fed. Rep. 47.

99. RAILROAD COMPANIES — Negligence.— Municipal ordinances requiring the ringing of the locomotive bell whenever a steam-engine is approaching or crossing a public street, and requiring the presence of a flagman at important crossings, to the end that people may be suitably and seasonably warned of the approach of railroad trains, are reasonable and proper regulations; and failure by a railway company to observe such an ordinance is negligence.—*Denver & R. G. R. Co. v. Ryan*, Colo., 28 Pac. Rep. 79.

100. RAILROAD COMPANIES—Elevated Railroad—Damages.—The executors and trustees of a deceased abutter do not occupy the relation of purchasers, but succeed, in behalf of the beneficiaries, to the rights of the abutter, and may, recover for damages to the rental value of the land, caused by the operation of such railroad.—*Mortimer v. Metropolitan El. R. Co.*, N. Y., 29 N. E. Rep. 5.

101. RAILROAD COMPANIES—Injury to Employee—Pleading.—In an action against a railroad company to recover damages for personal injuries, an allegation that plaintiff was upon defendant's track "at the instance and request of the defendant," and that defendant, notwithstanding its duty to manage its engines and trains "so as not to injure the plaintiff, * * * negligently ran over and injured the plaintiff with one of its engines," was sufficient although it did not aver the particular acts or omissions constituting the negligence.—*Mobile & O. R. Co. v. George*, Ala., 10 South. Rep. 145.

102. RAILROAD COMPANIES—Negligence—Trespasser.—In an action against a railroad company for damages for killing plaintiff's intestate, where the evidence shows that decedent was, at night, walking along the track through a long cut that could not be used at any place as a crossing, in a sparsely settled neighborhood, and was killed by a train coming up from behind, the decedent became a trespasser when he entered the cut, and was *per se* guilty of contributory negligence.—*Savannah & W. R. Co. v. Meadows*, Ala., 10 South. Rep. 141.

103. RECEIVER OF RAILROAD COMPANY.— Where the property of a railroad company is placed in the hands of a receiver, and rolling stock is found on the railroad, placed there by another corporation, the principal stockholders in which are also controlling stockholders in the railrord company, and the rolling stock is claimed by the corporation placing the same on the road, and no contract of sale is shown, *held*, that the receiver should be authorized to purchase the same and pay the value of the rolling stock when the property went into the receiver's hands.—*Central Trust Co. v. Marietta & N. G. Ry. Co.*, U. S. C. C. (Ga.), 48 Fed. Rep. 32.

104. RELIGIOUS SOCIETIES—Secession—Right to Property.— Where a trust is created for the benefit of a church, for as long as worship may be held according to the rules and discipline from the time to time adopted by the church at large at their general conferences, and afterwards the church's confession of faith is revised by order of a general conference, and the court is unable to discover any antagonism between the revised confession and that in use at the time of the creation of the trust, the courts cannot interfere on the ground that the trust is being used for purposes other than those designated in the trust-deed.—*Lamb v. Cain*, Ind., 29 N. E. Rep. 13.

105. RIPARIAN RIGHTS — Land under Water.—Where a riparian owner conveys his land he cannot reserve any right to the adjacent land under the water, of which he has received no grant from the State; but the grantee becomes the riparian owner, and as such is entitled to apply to the State for a grant of the land under the water.—*E. G. Blacklee Manuf'g Co. v. E. G. Blacklee's Sons Iron Works*, N. Y., 29 N. E. Rep. 3.

106. SALE—Delivery — Attachment.— Where personal property is contracted to be sold upon condition that it shall be delivered at a particular place, it is subject to attachment, at the suit of the creditors of the vendor, until it is delivered in accordance with the condition of the contract.—*Johnson v. Bailey*, Colo., 28 Pac. Rep. 81.

107. SALE — Warranty.— On a contract for the sale of cotton, although that delivered is not of the quality stipulated, if other cotton, which is satisfactory, is by mutual agreement substituted therefor, and is accepted and paid for by the buyer, he cannot afterwards maintain an action for breach of warranty.—*R. B. Gage Manuf'g Co. v. Woodward*, R. I., 23 Atl. Rep. 16.

108. SENTENCE AND PUNISHMENT — Commutation. — The provision of Rev. St. 1889, § 4355, that when any person shall be unable to pay any fine, assessed against him the justice shall have power, upon defendant's request, to commute his fine to imprisonment for a term depending upon the amount of his fine, and that where defendant shall have been imprisoned in the county jail for 20 days for the non-pay-

ment of any costs, and shall be unable to pay the same, he shall be released under the insolvent act, is not repugnant to Const. art. 5. § 8, whereby the governor is vested with power to grant reprieves, commutations, and pardons.—*Ex parte Parker*, Mo., 17 S. W. Rep. 658.

109. SHIPPING—Limiting Liability—What are Vessels.—A steam-propeller was wrecked and abandoned to the underwriter as a total loss. The propeller was subsequently taken in tow by a wrecking master, together with her cargo and crew, but sank in about 22 hours, and one of the crew was drowned: *Held*, that the propeller was still "a vessel" at the time of sinking, within the meaning of the statute limiting the liability of the owner of the vessel.—*Craig v. Continental Ins. Co.*, U. S. S. C., 12 S. C. Rep. 97.

110. SPECIFIC PERFORMANCE — Upon the facts, *held*, that plaintiff was not entitled to relief.—*Mc Tammany v. Munroe Organ Reed Co.*, Mass., 29 N. E. Rep. 52.

111. SPECIFIC PERFORMANCE—Time of the Essence.—Where a contract, sought to be specifically enforced, recites that, if plaintiff "fail to comply with any one of the agreements herein specified, at the time specified, then this contract shall immediately become void," and defendant, in a letter extending the time for making the last payment under the contract, says that "time must be the special and essential ingredient in the extension, as it was intended to be in the original contract," the evidence is conclusive that time is of the essence of the contract.—*Bennett v. Hyde*, Cal., 28 Pac. Rep. 104.

112. TAXATION—Assessment.—An attorney, appointed by the president of a corporation to represent it before the assessors of taxes, made oath to an account of the taxable property of the corporation required by Pub. St. ch. 43, §§ 6, 7, which provide that "every person bringing in such account shall make oath" before one of the assessors that it is true. The corporation subsequently voted to approve the appointment of the attorney, in order that it "might take proper legal action to secure justice in the matter of taxation:" *Held*, that the appointment did not authorize, nor its approval ratify, the oath made by the attorney.—*Narragansett Pier Co. v. Assessors of Taxes*, R. I., 23 Atl. Rep. 11.

113. TAXATION — Assessment—Description.— Property assessed must be described with sufficient certainty to identify it, so that the owner cannot be misled by the description.—*Augusti v. Lawless*, La., 10 South. Rep. 171.

114. TAXATION—Shares—Corporations.—The stock of such companies comes within Gen. St. § 3880, which provides that the tax list of any person need not include any property situated in another State when it can be made satisfactorily to appear to the assessor that the same has been fully assessed in such State; and, unless the contrary clearly appears, the presumption is that such stock has been assessed elsewhere.—*Lockwood v. Town of Weston*, Conn., 23 Atl. Rep. 9.

115. TAX SALE—Assignment.—The revenue act of Missouri of 1872 makes the certificates of purchase of lands at a tax sale assignable "by indorsement thereon under the hand of the purchaser." Section 216 authorizes the collector to make a deed to the assignee, but requires the deed to recite the fact of the assignment; and section 217, prescribing the form of the deed, requires a recital that the indorsement was under the hand of the purchaser, written on the back of the certificate of purchase: *Held*, that a deed simply reciting that the purchaser had assigned to the grantees all his "right title, and interest in and to said land" was void, as not substantially complying with the statute.—*Pitkin Schacklett*, Mo., 17 S. W. Rep. 641.

116. TENANTS IN COMMON — Conveyances. — Where a common estate can only be partitioned by sale, one of the tenants may convey his interest to a stranger, without the consent of his co-tenant since, as the partition is not of the land, but of the proceeds of sale, the conveyance cannot affect the rights of the co-tenant who, in the division, will receive his full share.—*Horgan v. Bickerton*, R. I., 23 Atl. Rep. 23.

117. TOWNS—Relief Furnished by Physicians.—Physicians affording relief to a person in condition requiring relief, under section 1494, Rev. St., which provides that the township shall be liable for relief afforded "only in such amount as the trustees determine to be just and reasonable," have a claim against the township wherein such relief is afforded for no greater amount than the trustees determine to be just and reasonable.—*Trustees of Elizabeth Tp. v. White*, Ohio, 29 N. E. Rep. 47.

118. TRADE-NAME—Infringement.—The publication of a series of stories entitled "Old Sleuth Library," and purporting to relate the adventures of a detective called "Old Sleuth," does not entitle the publisher to an exclusive right to the use of the word "Sleuth" in the titles of stories about detectives.—*Munroe v. Tousey*, N. Y., 29 N. E. Rep. 9.

119. TRESPASS—Carrying away Timber — Damages.—Section 338, Hill's Code, fairly construed, would include, not merely the value of the timber or wood cut, but such damages as accrued to the freehold by their destruction. When the action is for carrying away timber already cut, the damages could not well go beyond its value; but, where standing trees are cut down, the rule of damages should fairly be the amount of which the value of the estate is diminished by their destruction.—*Oregon & C. R. Co. v. Jackson*, Oreg., 28 Pac. Rep. 74.

120. TRUST DEED—Foreclosure.—A trust deed made by a manufacturing corporation to secure its bonds empowered the trustees, on default of interest payments, to sell the property "if, after notice is served on the the president of said company, the same shall remain unpaid for six months after such default:" *Held*, that when the trustees sued to foreclose, instead of selling under the power, it was unnecessary to aver the giving of notice of default to the defendant.—*Robinson v. Alabama & G. Manuf'g Co.*, U. S. C. C. (Ga.), 48 Fed. Rep. 12.

121. TRESPASS—Oil Leases.—An oil lease granted to plaintiff for a term of years the exclusive right to bore for oil on a certain tract, restricting his right to occupy and operate on the premises to certain designated sites. After he had begun operations, the defendant, who purchased the lessor's interest, gave an oil lease of part of the land, not including any of the sites in plaintiff's lease, but in close proximity to them, and such lessees began boring for oil: *Held* that, though equity had jurisdiction to restrain defendant's lessees and redress the injury to plaintiff, such jurisdiction did not oust the jurisdiction at law.—*Duffield v. Rosenzweig*, Penn., 28 Atl. Rep. 4.

122. TRUST.—Plaintiff purchased a one-half interest in defendant's stock and ranches in Colorado, and took charge of the business. Defendant came to Oregon, and afterwards it was agreed to exchange the property in Colorado for that in controversy. While plaintiff was yet in Colorado the exchange was made, and without his consent the Oregon property was conveyed to defendant alone, and was operated in his name: *Held*, that an undivided one-half interest in the property was held by defendant in trust for plaintiff.—*Puckett v. Puckett*, Oreg., 28 Pac. Rep. 65.

123. USURY—Evidence.—Where plaintiffs in an action on a debt greater than the sum loaned with lawful interest, in which the defense is usury, set up, as consideration for the excess, services of a neighborly character, generally performed without remuneration, and there was no special agreement as to compensation, and it is not shown what charge was made for any particular service, it is insufficient to show that the transaction was not usurious.—*Humphrey v. McCauley*, Ark., 17 S. W. Rep. 713.

124. VENDOR AND VENDEE—Vendor's Lien.—A vendor of land, who takes the vendee's notes with a third person as surety, is presumed to have waived the vendor's lien.—*Kinney v. Ensminger*, Ala., 10 South. Rep. 143.